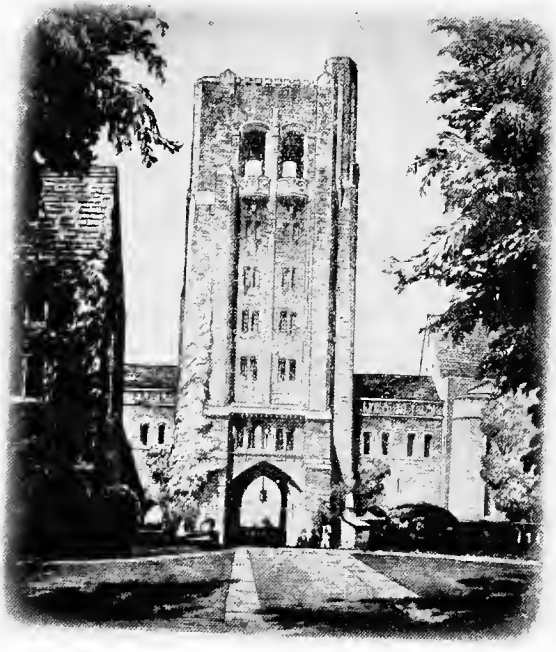
J. A. Hawes



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A BRIEF

FOR

THE TRIAL OF CIVIL ISSUES

BEFORE

A JURY.

By AUSTIN ABBOTT,

OF THE NEW YORK BAR.

It is equally important to koow the exact extent and limit of a right, whether counsel intends to insist, or thinks wiser to let it pass.

DIOSSY & CO.,
231 BROADWAY, NEW YORK.
1885.

PREFACE.

While the merits of every case may be a fair field for the contest of opposing opinion, the main rules of practice according to which that contest is to be carried on ought to be well understood and applied with as little difference of opinion as may be. The chief burden under which the business of the profession and the labors of the bench now suffer is the great number of mistrials, and consequent new trials, which result from the imperfect manner in which these rules are understood and applied.

In these pages, which are the outgrowth of briefs I have had occasion to prepare in practice, I have endeavored to state fairly the rules of forensic contest, on points that are frequently so disputed as to make it desirable to be prepared to cite authority at the trial.

I mention, however, only a small proportion of the authorities examined, believing that for the purpose of a brief a few well chosen are more useful than a mass. On questions of chief importance I have, however, given one or more recent authorities from each of a number of states.

Space has not allowed a full statement of the statutes and rules of court of other jurisdictions than New York; but I trust that I have indicated the existence of such statutes in such a way that the intelligent practitioner in any jurisdiction cannot be misled.

In making up a list of "Useful Authorities on Evidence" (Division XIII.), I have not confined myself to stating what I deem to be settled law, deeming it there more useful to index concisely the best authorities, including some debatable points, rather than to take space to state each rule at length.

In these days more good verdicts are set aside, or hopes of verdict frustrated, by errors in regard to whether the case should go to the jury or not, than from any other cause. On the subject of "Taking the Case from the Jury" (Division XV.), I have stated the rules which, if I rightly understand the existing law as to New Trials, and Appeal, ought to govern our trial courts in disposing of motions for a nonsuit, or to direct a verdict, and demurrers to evidence. I am not aware that these rules are anywhere else shortly and systematically stated, nor have I found it practicable to state them concisely and correctly by following the language of the reports. But they may be seen constantly applied in practice by the ablest judges, and their application is now habitually sustained and enforced with remarkable consistency by the leading appellate courts. They are both reasonable and useful; and, indeed, all that is modern in them is the necessary result of modern changes in the law of evidence and review; and in those states where, as shown by notes appended to the rules, they are not yet fully adopted, a general progress toward their adoption is clearly traceable in the current of decision.

If this little volume serves to facilitate the prompt and correct disposal of business at the circuit, its principal object will be accomplished.

AUSTIN ABBOTT.

71 Broadway, New York,
Aug. 15, 1885.

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BRIEF

ON

Jury Trial in Civil Actions.

I.—APPLICATIONS TO POSTPONE.

[The diversity in laxity and strictness in different Courts in applying these rules, makes it important to notice that they ought to be administered in view of the consideration that the right of trial by jury involves on the one hand the right to a reasonably prompt trial, and on the other hand the right to reasonable opportunity to get one's evidence in Court, and to have his witnesses examined there under oath. Hence has arisen the modern rule, that at least after a first postponement an application for further postponement involves a question of right; and although the grounds are necessarily to some extent discretionary, the exercise of the discretion is generally reviewable at least by the full bench in the same Court, and usually, in case of the inferior State Courts, by the appellate Court.]

1. *Absence of the party.*—Absence of the party himself from the trial, without good cause shown, is not ground for a postponement as matter of right;[1] and it is

not enough to show that he remains away in reliance upon his attorney's advice that the case would not be reached.[2]

[1] Tucker *vs.* Garner, 25 *Kans.*, 454.
Pardridge *vs.* Wing, 75 *Ill.*, 236.

Absence, from sudden illness, has been held to make it error to refuse.
Douglass *vs.* Blakemore, 12 *Heisk.* (*Tenn.*), 564.

Contra, where illness was shown only by physician's certificate, without affidavit.
Schnell *vs.* Rothbath, 71 *Ill.*, 83.

A general allegation that the party's presence was necessary for conference with his counsel during the cause, held, not enough to make it error to refuse.
Pate *vs.* Tait, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. Law Bul.*, 173.

[2] Brock *vs.* South. & North. Ala. R. R. Co., 65 *Ala.*, 79.
Brandt *vs.* McDowell, 52 *Iowa*, 230.

2. — *of counsel.*—Absence of attorney or counsel, without good cause shown, is not ground of postponement as matter of right.[1]

Illness may make it matter of right, where it is impracticable, with due diligence, to secure other counsel in time.[2]

In the absence of any regulation to the contrary, *actual engagement* of counsel in the trial or argument of a cause in another Court at the same time, is good ground for claiming a postponement;[3] but absence on other engagements is not.[4]

[1] Whitehall *vs.* Lane, 61 *Ind.*, 93.
Kern Valley Bank *vs.* Chester, 55 *Cal.*, 49.

Even though he be new counsel called in for the first time.
Darley *vs.* Thomas, 41 *Geo.*, 524.

[2] Rice *vs.* Melendy, 36 *Iowa*, 166.

So also where counsel was kept away by illness in his family.
Thompson *vs.* Thornton, 41 *Cal.*, 626.

Otherwise, of a simple case which any one could try without preparation.
Jarvis *vs.* Schacklock, 60 *Ill.*, 378.

[3] Hill *vs.* Clark, 51 *Geo.*, 122 (holding it error to refuse).
Gerlach *vs.* Engelhoffer, 7 *Phil.*, 241.

[*Contra*, holding it discretionary, after several continuances.
Brock *vs.* South. & North. Ala. R.R. Co., 65 *Ala.*, 79.]

In the New York City Circuit the rule is that "No cause on any day calendar will be passed, except where the counsel is actually engaged in a trial of a cause in another court in the city, or in the Court of Appeals; and then only until such an engagement is discharged, or upon proof of the absence of a witness duly subpœnaed."
N. Y. Rules of 1884. *Bliss' ed., by Clement*, 111; Same rule, *Hun's ed.*, 284.

[4] Jackson *vs.* Wakeman, 2 *Cow.*, 578.

3. *Absence of witness—neglect to subpœna.*—Absence of a witness whom the applicant omitted to subpœna, though in reliance on his promise to attend, does not entitle to a postponement;[1] but the application is discretionary with the trial Court.[2]

[1] Common practice.
Freeland *vs.* Howell, *Anth. N. P.*, 272.

Otherwise, of a foreign witness who could not be subpœnaed because beyond the jurisdiction, but whose promise was properly relied on.
Cahill *vs.* Hilton, 31 *Hun*, 114.

[2] Farmers & Drovers' Bank *vs.* Williamson, 61 *Mo.*, 259.

4. — —, *or to take deposition.*—Nor does absence of a transient witness, whom the applicant had adequate opportunity to examine before trial.

Smith *vs.* Cunningham, 9 *Phil. (Pa.)*, 96.
Campbell *vs.* Blanke, 13 *Kans.*, 62.
McKay *vs.* Marine Ins. Co., 2 *Cai.*, 384.

5. — *of foreign witness.*—Absence of a foreign witness is ground for postponement if there were circum-

stances justifying the reliance of the applicant on his voluntary attendance.[1] Otherwise not.[2]

[1] Cahill *vs.* Hilton, 31 *Hun*, 114 (error to refuse).
Mowat *vs.* Brown, 17 *Fed. R.*, 718.
Brown *vs.* State, 65 *Geo.*, 332.

[2] Campbell *vs.* Blanke, 13 *Kans.*, 62 (witness residing in another county).

6. — *no opportunity to procure.*—Absence of a witness who unexpectedly went abroad so that there was no opportunity to subpœna him, is ground for postponement.[1] So of the unexpected death of a subpœnaed witness, too shortly before the trial to allow of getting other evidence.[2] So may be the absence of documentary evidence, the existence of which was too recently discovered to enable the party to have produced it.[3]

[1] Nixen *vs.* Hallett, 2 *Johns. Cas.*, 218.

[2] Long *vs.* McDonald, 39 *Geo.*, 186 (judgment reversed for refusing postponement).

[3] Cahill *vs.* Dawson, 1 *Fost. & F.*, 291.
Higginson *vs.* Bank of England, *Id.*, 450.

7. *Affidavit may be required.*—Upon an application to postpone a trial the Court may require that the facts stated as the ground of the application be presented by affidavit.

Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr., N. S.*, 382. A well considered case, where it is said that *the party* may require it.
Tribune Association *vs.* Smith, 40 *Super. Ct.* (*J. & S.*), 251.
Thompson *vs.* Miss. Ins. Co., 2 *La.*, 228; s. c., 22 *Am. Dec.*, 129.

But oral statements, if not objected to, are of equivalent effect.
Tribune Association *vs.* Smith (*above*).

8. *Who to make.*—An affidavit by the party may be required, unless sufficient reason for accepting the

affidavit of another person appears.[1] Refusing to accept the attorney's affidavit when inability of the party to make it is shown, is error.[2]

[1] The Court will not receive the affidavit of the attorney's clerk, unless it state that he has the management of the cause and is particularly acquainted with the circumstances.
Sullivan *vs.* Magill, 1 *H. Blackst.*, 637.

[2] Lockhart *vs.* Wolf, 82 *Ill.*, 37 (judgment reversed for this error).

9. *Contents.*—An affidavit to support an application to postpone, on account of absence of evidence,[1] must be to:

(1.) The merits;[2]

(2.) The materiality of the desired evidence;[3]

(3.) Facts showing due diligence already exercised in the endeavor to procure it;[4] and

(4.) Assurance of probable presence of the evidence at the time proposed.[5]

Allegations on information must state the names and residences of the informants.[6]

[1] This rule is generally stated, as it generally occurs, as relating to witnesses; but it applies to documents also.

[2] Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr., N. S.*, 382.

[Oath to merits not required in England.
Hill *vs.* Prosser, 3 *Dowl. P. C.*, 704.]

[3] *Id.*
People *vs.* Vermilyea, 7 *Cow.*, 369, 384.
Sellars *vs.* Kelly, 45 *Miss.*, 323.
Kern Valley Bank *vs.* Chester, 55 *Cal.*, 49.
Sprague *vs.* Heaps, 7 *Ill. App.*, 447.
Green *vs.* King, 17 *Fla.*, 552.

Omission to name the witness held no objection, in Smith *vs.* Dobson, 2 *Dowl. & R.*, 420, and see Brown *vs.* Murray, 4 *Dowl. & R.*, 832.
Contra, State *vs.* Underwood, 76 *Mo.*, 630.

[4] Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr., N. S.*, 382.
Wolcott *vs.* Mack, 53 *Ind.*, 269.
Ilett *vs.* Collins, 102 *Ill.*, 402.
People *vs.* Vermilyea, 7 *Cow.*, 369, 384.
Labbaite *vs.* State, 6 *Tex. App.*, 257.
Thomas *vs.* McCormick, 1 *New Mexico*, 369.
Kern Valley Bank *vs.* Chester, 55 *Cal.*, 49.
King *vs.* D'Eon, 1 *W. Blackst.*, 510; s. c., 3 *Burr.*, 1513.
Lillienthal *vs.* Anderson, 1 *Idaho, N. S.*, 673.
Ingalls *vs.* Noble, 14 *Nebr.*, 272.
Moon *vs.* Helfer, 25 *Kans.*, 139.
s. p., Sprague *vs.* Heaps, 7 *Ill. App.*, 447.
Handline *vs.* State, 6 *Tex. App.*, 347.
Green *vs.* King, 17 *Fla.*, 452.
Flournoy *vs.* Marx, 33 *Tex.*, 786 (holding a general averment of due diligence not enough).

[5] Brooklyn Oil Works *vs.* Brown, 7 *Abb. Pr., N. S.*, 382.
Brown *vs.* Moran, 65 *How. Pr.*, 349.
s. p., Sprague *vs.* Heaps, 7 *Ill. App.*, 447.

[6] Comstock *vs.* State, 14 *Neb.*, 205.
Thompson *vs.* Miss. Ins. Co., 2 *La.*, 228; s. c., 22 *Am. Dec.*, 129.
Labbaite *vs.* State, 6 *Tex. App.*, 257.
In some cases inability to procure another witness instead, is required to be shown.
Jarvis *vs.* Schacklock, 60 *Ill.*, 378.

10. — *disclosing materiality.*—In stating the materiality of the desired evidence, a general allegation is usually enough on a first application.[1]

But if a postponement has already been had,[2] or if circumstances of suspicion or imputation of laches appear,[3] or if the necessary delay is great,[4] the Court may require that the affidavit state what the desired evidence will prove,[5] and the names and residences of desired witnesses,[6] or disclose the nature of the evidence sufficiently to see that upon fair and probable grounds it will be material.[7]

[1] People *vs.* Vermilyea, 7 *Cow.*, 369, 386.
Hooker *vs.* Rogers, 6 *Cow.*, 577.
Wicker *vs.* Boynton, 83 *Ill.*, 545 (*dictum*).
[*Contra*, Kern Valley Bank *vs.* Chester, 55 *Cal.*, 49.]

An application is deemed to be a first application within this rule if the only previous application proved to have not delayed the cause, by reason of its not having been reached.
Pulver *vs.* Hiserodt, 3 *How. Pr.*, 49.

[2] Moon *vs.* Helfer, 25 *Kans.*, 139.

[3] People *vs.* Vermilyea, 7 *Cow.*, 369, 384.
Bush *vs.* Weeks, 24 *Hun*, 545 (Justices' Court case).

[4] Lord *vs.* Cooke, 1 *W. Blackst.*, 436.

[5] In Ogden *vs.* Payne, 5 *Cow.*, 15, it was held that the mere fact that the desired witness was the attorney of the party, so that it was possible his testimony might be privileged, was not ground for requiring a disclosure.

[6] Ilett *vs.* Collins, 102 *Ill.*, 402.
Thomas *vs.* McCormick, 1 *New Mex.*, 369.
S. P., Lillienthal *vs.* Anderson, 1 *Idaho, N. S.*, 673.
Vanwey *vs.* The State, 41 *Tex.*, 639 (affidavit omitting to state knowledge of residences).

And, according to Brown *vs.* Johnson, 14 *Kans.*, 377, and Cody *vs.* Butterfield, 1 *Col.*, 377, sufficiently to give the adverse party a right to defeat the application by admitting the facts.

The motion should be denied if the desired evidence is inadmissible under the pleadings.
Cartwright *vs.* Culver, 74 *Mo.*, 179.
Waldo *vs.* Beckwith, 1 *New Mex.*, 182.
Thackaray *vs.* Hanson, 1 *Col.*, 365.

And may be denied if the witness is privileged.
Lavery *vs.* Crooke, 52 *Wisc.*, 612; S. C., *South. Law Rev., N. S.*, 592.

11. *Opposing the motion—presumptions.*— It is presumed that the applicant will state the facts as strongly in his own favor as the nature of the case permits, and therefore the Court is not called upon to make presumptions in his favor.

Per Ogden, J., in Van Brown *vs.* The State, 34 *Tex.*, 186.
S. P., Dold *vs.* Dold, 1 *New Mex.*, 397.

12. — *counter affidavits.*—The Court may, in its discretion, receive counter affidavits.[1] But evidence to

disprove the facts which the applicant desires opportunity to prove, is inadmissible.[2]

[1] Even a justice of the peace has discretionary power to allow plaintiff to introduce evidence showing that defendant's application for postponement is not made in good faith, and is groundless.
Weed *vs.* Lee, 50 *Barb.*, 354.

Especially where there is suspicion of fraud or imposition.
Cushenberry *vs.* McMurray, 27 *Kans.*, 328.

But in the Star Route case, Dec., 1882, WYLIE, J., refused to do so, saying that a motion for continuance must be decided on the affidavit of the party applying for it.
To the same effect are Wick *vs.* Weber, 64 *Ill.*, 167, and Quincy Whig Company *vs.* Tillson, 67 *id.*, 351, intimating that it is error to receive counter affidavits.

In Walt *vs.* Walsh, 10 *Heisk.* (*Tenn.*), 314, the Court declined to pass upon the practice of hearing counter affidavits, but intimated that it is proper for the inferior court to hear enough of the testimony to enable it to pass upon the motion.

[2] Horn *vs.* State, 62 *Geo.*, 362.

13. — *admitting the desired facts.*—Where the applicant discloses what facts he intends to prove by the desired evidence, it is a sufficient answer to the application to admit the truth of those facts.[1]

But the admission must be unqualified.[2] It is not enough to admit that the desired witness would swear to such facts.[3]

Brill *vs.* Lord, 14 *Johns.*, 339 (even under a statute requiring a justice to postpone for such reasonable time as will enable the defendant to procure testimony or witnesses).
State *vs.* Plowman, 28 *Kans.*, 569.
Kitchens *vs.* Hutchins, 44 *Geo.*, 620 (*Geo. Code*, § 3472).
S. P., Calhoun *vs.* Mechanics, etc., Bank, 28 *La. Ann.*, 260.
Brown *vs.* Johnson, 14 *Kans.*, 377.
Green *vs.* King, 17 *Fla.*, 452.

So also even where the desired witness was the party himself on whose behalf the application was made.
Pate *vs.* Tait, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. L. B.*, 173.
Pruyn *vs.* Gibbens, 24 *La. Ann.*, 231.

[2] Nave *vs.* Horton, 9 *Ind.*, 563.
Cheney *vs.* Smith, 42 *Geo.*, 50 (*Geo. Code*, § 3472).
Klugman *vs.* Gammell, 43 *id.*, 581.
Smith *vs.* Creason, 5 *Dana* (*Ky.*), 298; s. c., 30 *Am. Dec.*, 688.

[3] People *vs.* Vermilyea, 7 *Cow.*, 369, 388, 389, 400.
s. p., Pate *vs.* Tait, 72 *Ind.*, 450; s. c., 6 *Weekly Cin. L. B.*, 173.

14. *Imposing conditions; costs.*—The Court may impose payment of costs and disbursements as a condition.[1]

Unless otherwise directed such payment is to be made instanter,[2] and without awaiting formal demand.[3]

[1] *N. Y. Code Civ. Pro.*, § 3255.

In the absence of special cause for other conditions this is all that should be required.
Hall *vs.* Dwinell, 10 *Wend.*, 628.

In N. Y. the costs cannot exceed $10, besides disbursements.
Noxon *vs.* Bentley, 6 *How. Pr.*, 418.
Jackson *vs.* McBurney, *id.*, 408.
Unless leave to amend is granted.

[2] Jackson *vs.* Pell, 19 *Johns.*, 270.
Bulkeley *vs.* Keteltas, 2 *Sandf.*, 734.

[3] Jackson *vs.* Pell (*above*).

15. — — *stipulation against abatement.*—On granting an application made on behalf of a party dangerously ill, the Court may require a stipulation that death before final judgment shall not abate the action.[1]

The attorney has power to bind his client by such a stipulation.[2]

[1] Ames *vs.* Webbers, 10 *Wend.*, 576.

[2] Cox *vs.* N. Y. Central, etc., R. R. Co., 63 *N. Y.*, 414; rev'g 4 *Hun*, 176; s. c., 6 *Supm. Ct.* (*T. & C.*), 405.

It was there conceded that counsel have the same power as the attorney of record. But in Nightingale *vs.* Oregon Central R. R. Co. (U. S. Circ. Ct., Oreg., 1873), 17 *Int. Rev. Rec.*, 61, repeated at p. 93, DEADY, J., granted plaintiff's motion to set aside an order for continuance, on the ground that it was entered on a stipulation signed by counsel only; he being of opinion that only the attorney of record could sign such a stipulation, and that neither counsel, even though interested in the cause of action, nor the client himself, having an attorney of record, could do so.

The true rule is, that counsel having sufficient authority to appear for the trial of the cause (and an application to postpone is part of the trial) have, at least in the absence of the attorney of record, and equally in his presence and without his dissent, authority to bind the client by acceding to any condition the Court have power to impose.

16. *Remedy for refusal.*—An exception lies to the refusal of an application to postpone,[1] if made before going on with the trial;[2] and the affidavits may be made part of the record.[3]

[1] Howard *vs.* Freeman, 3 *Abb. Pr., N. S.*, 292; s. c., 7 *Robt.*, 25.
Gallaudet *vs.* Steinmetz, 6 *Abb. N. C.*, 224; s. c. less fully, 45 *Super. Ct.* (*J. & S.*), 239.
Gregg *vs.* Howe, 37 *id.*, 420.
s. p., Lillienthal *vs.* Anderson, 1 *Idaho, N. S.*, 673.
Johnson *vs.* Dinsmore, 11 *Nebr.*, 391.

In the Supreme Court of the United States the contrary is held, the decision of the Court below being regarded as discretionary, and not reviewable in error.
Woods *vs.* Young, 4 *Cranch*, 237.
Barrow *vs.* Hill, 13 *How.* (*U. S.*), 54.
Thompson *vs.* Selden, 20 *id.*, 194.
Contra, also Wooldridge *vs.* State, 13 *Tex. App.*, 443.

[2] A motion to suspend the trial to enable the applicant to obtain testimony is addressed to the discretion of the Court.
Rapelye *vs.* Prince, 4 *Hill*, 119; s. c., 40 *Am. Dec.*, 267. *So held* even where defendant wished to call plaintiff.
s. p., Holbrook *vs.* Wilson, 4 *Bosw.*, 64, 72.

[3]Howard *vs.* Freeman, 3 *Abb. Pr., N. S.*, 292; s. c., 7 *Robt.*, 25.
Giraudat *vs.* Korn, 8 *Daly*, 406.

Granting or refusing a continuance rests in sound discretion, and the appellate Court will only interfere in the cases of unreasonable discretion.
Lillienthal *vs.* Anderson, 1 *Idaho*, 673.

II.—IMPANELLING JURY.

[The statutes abrogating resort to triers, and leaving it to the Judge to determine all causes of challenge, do not, without more, abrogate the distinction between challenges for principal cause and challenges to the favor. In the former class, if the fact suggested be established, incompetency is an inevitable conclusion of law; in the latter incompetency is a mere question of fact.

The application of the following rules should be guided by the recognized principles that, in the absence of statute to the contrary: (1) a Court of general jurisdiction, finding the statutory means of providing a jury inadequate, may fall back on its common law powers; (2) that an unfit juror may be set aside on a just objection, though the statute do not provide for the case; and (3) that the judge may properly interpose of his own motion, when necessary to secure a fit and impartial jury.]

1. *The right to challenge.*—The right to challenge jurors for a cause assigned, as distinguished from peremptory challenge, is a common law right, which cannot be taken away except by express statute.

Barrett *vs.* Long, 3 *Ho. of L. Cas.*, 395, 415.

2. *Interrogating the jurors.*—Each party has the right, before the jury is sworn, to interrogate each proposed juror under oath, or have the Court do so, on points material to the question whether he has the qualifications required by law, and is impartial.[1]

But questions tending to his disgrace[2] or disadvantage[3] cannot be asked the juror.

[1] Hull *vs.* Albro, 2 *Disney* (*Ohio*), 147, 149.
Lœffler *vs.* Keokuk, etc., Packet Co., 7 *Mo. App.*, 185, 189.
Gilliam *vs.* Brown, 43 *Miss.*, 641.
Other cases in 23 *Am. Dec.*, 131, note.
Contra, in So. Car. State *vs.* Crank, 2 *Bailey*, 66; s. c., 23 *Am. Dec.*, 117.

This right extends to facts not in themselves disqualifying, if in connection with others they might show bias.
Mechanics' & Farm. Bk. *vs.* Smith, 19 *Johns.*, 115.

It is for the Court to say what evidence is admissible on the question of impartiality.
Smith *vs.* Floyd, 18 *Barb.*, 522.

Interrogating as to general opinions of a juror's duties was held not allowed even for the purpose of ascertaining if the juror is "of sound judgment and well informed" as required by the statute in Pennsylvania Co. *vs.* Rudel, 100 *Ill.*, 603.

[2] Burt *vs.* Panjaud, 99 *U. S.* (9 *Otto*), 180, 181.
Mechanics' & Farm. Bk. *vs.* Smith, 19 *Johns.*, 115.
People *vs.* Fuller, 2 *Park. Cr.*, 16.

[3] 3 *Blackst. Com.*, 363.

3. *Evidence aliunde.*—A witness may be called to prove the ground of challenge.

Pringle *vs.* Huse, 1 *Cow.*, 432.
S. P., Burt *vs.* Panjaud, 99 *U. S.* (9 *Otto*), 180.

4. *Exception.*—An exception lies to the admission or exclusion of evidence under either of the two preceding rules.

5. *Grounds of challenge; Interest.*—An interest in the result of the action disqualifies.[1] Membership in a

corporation which is a party is an interest within this rule.[2]

At common law this is ground of a challenge for principal cause.

[1] Wood *vs.* Stoddard, 2 *Johns.*, 194.
Melson *vs.* Dickson, 63 *Geo.*, 682; s. c., 36 *Am. R.*, 128.

But not an interest merely in the legal questions involved, without an interest in the result of the cause. See Williams *vs.* Smith, 6 *Cow.*, 166; Miller *vs.* The Wild Cat Gravel Road Co., 52 *Ind.*, 51, 59. But compare Lewis *vs.* Few, *Anth. N. P.*, 102; where it was properly held that a person present and acting at a political meeting was not competent as juror in an action between other persons for a libel contained in an address adopted at the meeting. And Lewis *vs.* Jefferson Co., 20 *Fla.*, 980; abstr. s. c., 19 *Cent. L. J.*, 136, where a holder of similar county bonds to those sued on was held disqualified.

It is not necessary to show a pecuniary interest; for a trustee of a charitable society, serving without compensation and having no possible pecuniary benefit from its recovery in the action, would be incompetent.

[2] Even where, as in a religious corporation, the membership is only the beneficial interest of one of the denomination in the administration of the trust represented by the trustees.
Cleage *vs.* Hyden, 6 *Heisk.* (*Tenn.*), 73. Judgment reversed for error in refusing to exclude members of the Methodist Episcopal Church, South, in action by the plaintiffs as trustees of that church.

This is on account of interest, not religious opinion; for that does not disqualify, (*ib.*) unless amounting or leading to bias in the particular case. But the fact that the juror is a fellow-member with a party, in a corporation or society,—as for instance, the masons—is only ground for challenge to the favor, that is it raises only a question of actual bias in the particular case.
Purple *vs.* Horton, 13 *Wend.*, 9, 23.

Membership in a corporation does not disqualify in an action to which the corporation is not a party, merely because a servant of the corporation is the defendant, if the case be such that there could be no benefit to or recovery over against the corporation.
Williams *vs.* Smith, 6 *Cow.*, 166.

6. — *citizen of municipality.*—At common law, and also under statutes declaring interest a disqualification, a citizen and tax-payer in a town, city or other municipality, is disqualified in an action in which it is a party,[1] unless it is otherwise provided by statute.[2]

At common law this is a ground of challenge for principal cause. If the relation exists the disqualification is absolute.

[1] *England*—Day *vs.* Savadge, *Hobart* 85* (*Am. ed.*, 212).
Connecticut—Bailey *vs.* Trumbull, 31 *Conn.*, 581, 583 (*dictum*).
Georgia—Mayor of Columbus *vs.* Goetchius, 7 *Geo.*, 139.
Illinois—Russell *vs.* Hamilton, 3 *Ill.*, 56, where an officer was the nominal party suing for benefit of township.
Indiana—Hearn *vs.* City of Greensburgh, 51 *Ind.*, 119.
Iowa—Cramer *vs.* City of Burlington, 42 *Iowa*, 315, 318.
Kansas—Gibson *vs.* Wyandotte, 20 *Kans.*, 156.
Massachusetts—Hawes *vs.* Gustin, 2 *Allen*, 402.
Missouri—Eberle *vs.* Board of St. Louis, 11 *Mo.*, 247. Fine *vs.* St. Louis, 30 *id.*, 166, 173.
Nebraska—City of Omaha *vs.* Cane, 15 *Nebr.* 657.
New Jersey—Peck *vs.* Essex, 1 *Zab.*, 656.
New York—Diveny *vs.* City of Elmira, 51 *N. Y.*, 506; Wood *vs.* Stoddard, 2 *Johns.*, 194, *Code Civ. Pro.*, § 1179. In the City of New York, which is co-extensive with the county, the objection is waived or ignored from necessity.
Rhode Island—Watson *vs.* Tripp, 11 *R. I.*, 98.
Tennessee—Cleage *vs.* Hyden, 6 *Heisk.* (*Tenn.*), 73.
Kentucky—(*contra*) Kemper *vs.* Louisville, 14 *Bush*, 87.

[2] General statutes in various jurisdictions, as well as special charter provisions, create numerous peculiar exceptions to this rule. Thus, in the State of New York, liability to pay taxes in a city, county or town, does not disqualify in a *penal* action.
N. Y. Code Civ. Pro., § 1179.
Residence does not disqualify in an action in which a county is *interested.*
N. Y. R. S., 384, § 4.
Nor in an action in which a town is *interested, unless the proceeding is by or against the town.*
Id., 357, § 4.

Nor does residence or liability to taxation in a village incorporated under the general act.

N. Y. L. 1870, c. 291, tit. viii., §§ 9, 28; same stat., 2 *R. S.*, 7 *ed.*, 904.

N. Y. Code Civ. Pro., § 1179.

7. — *relationship.*—Relationship by consanguinity or affinity[1] to a party, or to one who is disqualified by interest direct or indirect,[2] disqualifies.

At common law this disqualification extends to those in the ninth degree,[3] and no further. By statute in New York it extends to the sixth.[4]

At common law this is ground of challenge for principal cause.

[1] The affinity must be one subsisting at the time. If, upon a death in the line, issue do not survive, the affinity is severed.

Cain *vs.* Ingham, 7 *Cow.*, 478, and note.

After which it is only a circumstance to be considered on the question of actual bias as a ground of challenge to the favor.

[2] Thus relationship to counsel or attorney, whose fees depend on a recovery, disqualifies equally as relationship to a party.

Melson *vs.* Dickson, 36 *Am. R.*, 128; s. c., 63 *Geo.*, 682.

So of the relationship of a juror as son of a stockholder in a corporation party.

Georgia R. R. Co. *vs.* Hart, 60 *Geo.*, 550.

So, it seems, of relationship to an inhabitant of a city or town which is a party.

Day *vs.* Savadge, *Hobart*, 85* (*Am. ed.*, 212).

Bailey *vs.* Trumbull, 31 *Conn.*, 581, 583 (*dicta*).

[3] 3 *Blackst. Com.*, 363.

Recognized in Wirebach *vs.* Eastern Bank, 97 *Penn. St.*, 543, 552.

And in Cain *vs.* Ingham, 7 *Cow.*, 478.

Coke speaks of relationship without limit as to degree.

[4] *N. Y. Code Civ. Pro.*, § 1166.

The degree is ascertained by ascending from the juror to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the juror and party and excluding the common ancestor.

N. Y. Code Civ. Pro., § 46.

8. — *dependence — of juror on party.*—One who is subject to the control[1] of a party,[2] as for instance an employee,[3] or a tenant,[4] is disqualified, without evidence of bias.

At common law this is ground of challenge for principal cause.

[1] This is the test in this class of cases. Thus being a guest in an inn, for pay, or not shown to be gratuitously so, is not cause for principal challenge, because not a case of a position where one might be subject to control.
Cummings *vs.* Gann, 52 *Penn. St.*, 484.

[2] On general principles one subject to control of a person interested should be deemed equally disqualified.

[3] Hubbard *vs.* Rutledge, 57 *Miss.*, 7.

Central R. R. Co. *vs.* Mitchell, 63 *Geo.*, 173, holding that at common law all servants are disqualified.

[4] Hathaway *vs.* Helmer, 25 *Barb.*, 29.

And the abolition of distress for rent has not changed the rule. *Ib.*

9. — — *of party on juror.*—One who possesses like means of control over a party, as, for instance, his landlord, is not absolutely disqualified; but the circumstance is to be considered on the question of whether there is bias as matter of fact.

At common law this is ground of challenge to the favor only.

People *vs.* Bodine, 1 *Den.*, 281, 306.

10. — *acquaintance.*—Intimate acquaintance[1] with a party, or fellow-service in employment,[2] does not disqualify, but is a circumstance to be considered on the question of bias.

At common law this is a ground of challenge to the favor only.

[1] Moore *vs.* Cass, 10 *Kans.*, 288.

[2] People *vs.* Bodine, 1 *Den.*, 281, 306.

11. — *opinion.*—An opinion upon the merits of the case, previously formed or expressed, disqualifies, if it is positive and not merely hypothetical, and would require evidence to remove.

At common law this is ground of challenge for principal cause.[1]

An opinion does not disqualify if the juror testifies that he believes he can render an impartial verdict, according to the evidence, and that his previously formed opinion or impression will not bias or influence his verdict, and the Court is satisfied that he does not entertain such a present opinion or impression as will influence his verdict.[2]

If his testimony is not clear to this effect he should be excluded.

[1] See Greenfield *vs.* People, 6 *Abb. N. C.*, 1, and note.

[2] This is the modern rule, sanctioned by the decisions in civil cases and established in New York, even in criminal cases, by statute (*L.* 1872, c. 475; same stat., *N. Y. Code Crim. Pro.*, § 376), and in substance applied in other States, though not fully recognized in all. The principles involved are most frequently discussed in criminal cases.

The most recent case on the N. Y. Statute is People *vs.* Casey, 96 *N. Y.*, 115; s. c., 2 *N. Y. Crim. R.*, 194 (rev'g *id.*, 187 and 31 *Hun*, 158).

To similar effect are:
Gold Mining Co. *vs.* National Bank, 96 *U. S.* (6 *Otto*), 640.
Rogers *vs.* Rogers, 14 *Wend.*, 132.
Jackson *vs.* Commonwealth, 23 *Gratt.* (*Va.*), 919.
Freeman *vs.* People, 4 *Den.*, 9.
Lowenberg *vs.* People, 5 *Park. Cr.*, 414.
Sanchez *vs.* People, 22 *N. Y.*, 147.
Scranton *vs.* Stewart, 52 *Ind.*, 68.
Lycoming Fire Ins. Co. *vs.* Ward, 90 *Ill.*, 545, 547.
Smith *vs.* Eames, 3 *Scam.*, 76.
Union Gold Mining Co. *vs.* Rocky Mountain National Bank, 2 *Col.*, 565, 577.
Conway *vs.* Clinton, 1 *Utah*, 215.
Denver, S. P., etc., R. R. Co. *vs.* Moynahan (*Col.*, 1884), 5 *Pac. Rep.*, 811.

12. — *opinion as to incidental question.*—An abstract opinion as to a question incidentally involved[1] does not disqualify, unless found to be such as to be likely to influence the verdict.[2]

[1] For instance, in a life insurance case, the question whether suicide is evidence of insanity.

Compare Hagadorn *vs.* Mut. Life Ins. Co., 22 *Hun*, 249, and Boileau *vs.* Life Ins. Co., 9 *Phil.* (*Pa.*), 218.

Or in an action for willfully, fraudulently and corruptly refusing a vote, an opinion as to the duty to receive a vote.

Elbin *vs.* Wilson, 33 *Md.*, 135, 143.

[2] Dew *vs.* McDivitt, 31 *Ohio St.*, 139, 142.
Hughes *vs.* Cairo, 92 *Ill.*, 339.
Davis *vs.* Walker, 60 *id.*, 452.

13. — *prejudice.*—Prejudice against the business or calling in connection with which the cause of action arises, disqualifies if found to be such as to be likely to influence the verdict;[1] otherwise not.[2]

At common law this is ground for challenge to the favor only.

[1] Winnesheik Ins. Co. *vs.* Schueller, 60 *Ill.*, 465.
Robinson *vs.* Randall, 82 *id.*, 521.
Albrecht *vs.* Walker, 73 *id.*, 69.
S. P., U. S. *vs.* Borger, 7 *Fed. Rep.*, 193 (*crim. case*).

[2] Maretzek *vs.* Cauldwell, 5 *Robt.*, 660; S. C., 2 *Abb. Pr., N. S.*, 407.

14. — *litigation.*—Litigation between a party and a juror disqualifies absolutely, if an action implying ill-will, malice, or revenge,—such as assault, slander, etc.,—is pending; otherwise it does not disqualify, unless found to be likely to influence the verdict.

At common law the former is ground for challenge for principal cause; the latter for challenge to the favor only.

People *vs.* Bodine, 1 *Den.*, 281, 305.

Having a cause of action against the defendant, upon the same state of facts, is enough to disqualify.

Davis *vs.* Allen, 11 *Pick.*, 466; s. c., 22 *Am. Dec.*, 386. "There is abundant latitude for selection; none should sit who are not entirely impartial" (Shaw, Ch. J.).

15. *Time for challenging.*—Either party may be allowed to challenge a juror for cause at any time before he has been sworn as a juror.

Edelen *vs.* Gough, 8 *Gill*, 87, 89.

Scripps *vs.* Reilly, 38 *Mich.*, 10.

In the latter case, Marston, J., says:

"Whether counsel for the different parties have exhausted their peremptory challenges, and announced themselves satisfied with the jury or not, they have undoubtedly the right, certainly up to the time when the jury is sworn, to make further challenge for cause. It is the aim and policy of the law to have a fair and impartial jury, and to this end it would be the clear duty of the Court up to the last minute, to permit counsel to further examine the jurors."
Scripps *vs.* Reilly, 38 *Mich.*, 10, 13.

People *vs.* Damon, 13 *Wend.*, 351, lays down the broader, but very just rule, that the Court may allow necessary challenges to secure an impartial jury, at any time before testimony has been taken.

16. *Trial, evidence and decision.*—A challenge, whether for principal cause or to the favor, is now triable only by the judge.[1]

At common law, it may be tried by the judge if no objection be made;[2] but if the judge or a party object, a question of fact raised by either kind of challenge is to be tried by triers.

On a question of actual bias, even slight evidence is admissible.[3] The object of inquiry is the state of mind of the proposed juror; and that state must be such, in order to make him competent, as will lead to the inference that he will act with entire impartiality[4]

[1] This is now the common practice, and prescribed in N. Y. by *Code Civ. Pro.*, § 1180.

[2]People *vs.* Mather, 4 *Wend.*, 229; s. c., 21 *Am. Dec.*, 122.

[3]People *vs.* Bodine, 1 *Den.*, 281, 307.

[4]May *vs.* Elam, 27 *Iowa*, 365 (DILLON, J.).

17. *Exception.*—An exception lies to the erroneous overruling of an objection or challenge, but it may be unavailing if the party does not finally exhaust his peremptory challenges.[1]

[1]Robinson *vs.* Randall, 82 *Ill.*, 521 (DICKEY, J., dissented, being of opinion that the not exhausting the peremptory challenges did not render the error harmless).

Sullings *vs.* Shakespeare, 46 *Mich.*, 408.

Whittaker *vs.* Carter, 4 *Ired.* (*N. C.*), 461; s. p., Burt *vs.* Panjaud, 99 *U. S.* (9 *Otto*), 180; Eckert *vs.* St. Louis Transfer Co., 2 *Mo. App.*, 36; and Conway *vs.* Clinton, 1 *Utah*, 215; where, however, the objectionable jurors had been excluded by other challenges.

18. *Peremptory challenge — when interposed.*—A party has a right to reserve his peremptory challenges until the number of twelve is full, after objections or challenges for cause have been disposed of.

Sterling Bridge Co. *vs.* Pearl, 80 *Ill.*, 251, 254.

Taylor *vs.* Western Pacific R. R. Co., 45 *Cal.*, 323.

The head-note in the latter case is as follows:

> In a civil action a party is not bound to exercise his right of peremptory challenge to jurors, until there are in the jury box twelve persons whom the Court has adjudged to be competent jurors.
>
> Taylor *vs.* Western Pacific R. R. Co., 45 *Cal.*, 323.

Judgment was reversed for error in requiring a party to do so.

The reason is that unless a party has ascertained what jurors can be excluded for cause, and therefore need not be challenged peremptorily, he may lose the chief value of this privilege.

Hunter *vs.* Parsons, 22 *Mich.*, 96; citing 4 *Bl. Com.*, 353.

People *vs.* Bodine, 1 *Den.*, 281.

To the same effect is Taylor *vs.* Western Pac. R. R. Co., 45 *Cal.*, 323.

The statutes in some States are held to impose a different rule.

19. — *the same.*—A peremptory challenge is not too late at any time before the juror is sworn, unless there is reason to doubt its good faith.

Hunter *vs.* Parsons, 22 *Mich.*, 96.
s. p., Adams *vs.* Olive, 48 *Ala.*, 551.

Although ordinarily the Court should be satisfied of the good faith of an application to withdraw approval and challenge peremptorily instead, yet where an adjournment has intervened so that the jury may have been influenced, the right of peremptory challenge exists at the time of swearing the jury, and it is error to refuse to allow it.
Spencer *vs.* De France, 3 *Greene* (*Iowa*), 216.

Especially if after approving the jury as it stood a vacancy was made and a new juror called.
U. S. *vs.* Daubner, 17 *Fed. Rep.*, 793, 797.

20. — *number of.*—The number of peremptory challenges depends on the statute of the jurisdiction.[1]

Where several defendants unite in pleading and appear by the same counsel, they are entitled to but one set of peremptory challenges.[2] If they plead separately and appear by different counsel with defenses on which the verdict may be for one and against another, they are each entitled to the statute number[3]

[1] The N. Y. Statute allows two to each party.
Code Civ. Pro., § 1176.
The U. S. Statute three.
U. S. R. S., § 819.
U. S. *vs.* Daubner, 17 *Fed. Rep.*, 793, 797.

[2] Stone *vs.* Segur, 93 *Mass.*, 568.
Bibb *vs.* Reid, 3 *Ala.*, 88.
Stroh *vs.* Hinchman, 37 *Mich.*, 490.

[3] Stroh *vs.* Hinchman (*above*) (Cooley, J.).
Compare Sodousky *vs.* McGee, 4 *J. J. Marsh.*, 267, 269.
[*Contra* in the United States Courts.
U. S. R. S., § 819.]

21. *Court may set aside juror.*—The Court has power, before testimony has been taken, to set aside a

juror irrespective of whether he has been challenged;[1] and so doing is not error if an impartial jury is had,[2] and the objection did not exhaust the objector's peremptory challenges.[3]

[1] Gilliam *vs.* Brown, 43 *Miss.*, 641, 652, and cas. cit.

It is the duty of the Court to watch over the empanelling of a jury, so as to preserve its impartiality and purity. *Ib.*

S. P., U. S. *vs.* Reed, 2 *Blatchf.*, 435, 450.

Torrent *vs.* Yager, 52 *Mich.*, 506; S. C., 18 *Northw. Rep.*, 239.

The better opinion is that this power may be exercised at any time before testimony has been taken.

See People *vs.* Damon, 13 *Wend.*, 351.

Silsby *vs.* Foote, 14 *How.* (*U. S.*), 218.

[2] Atlas Mining Co. *vs.* Johnston, 23 *Mich.*, 36, 40.

[3] Atchison, Topeka, etc., R. R. Co. *vs.* Franklin, 23 *Kans.*, 74. Citing People *vs.* Ferris, 1 *Abb. Pr., N. S.*, 193.

III.—MOTIONS ON THE PLEADINGS.

1. Defendant's motion to dismiss complaint for insufficiency.
2. — several defendants.
3. — specifying the ground.
4. — exception to ruling.
5. — amending to defeat the motion.
6. — motion, when to be made.
7. Defendant's motion to dismiss because of admitted defense.
8. Plaintiff's motion for judgment for insufficiency of answer.
9. Motion to compel election.
10. Misjoinder.
11. Assessing damages.

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1. *Defendant's motion to dismiss complaint for insufficiency.*—The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by going to trial without raising it by answer or demurrer, but it may be taken by motion at the trial.[1] So of the objection that the Court has not jurisdiction of the subject of the action.

For the purposes of the motion, the allegations of the complaint are to be deemed true, as on demurrer.[2]

[1]Tooker *vs.* Arnoux, 76 *N. Y.*, 397, and cases cit.
Mosselman *vs.* Caen, 4 *Supm. Ct.* (*T. & C.*), 171; s. c., 1 *Hun*, 647.
Ludington *vs.* Taft, 10 *Barb.*, 447.
Stannard *vs.* Eytinge, 5 *Robt.*, 90; s. c., 3 *Abb. Pr.* (*N. S.*), 42; 33 *How. Pr.*, 262.
Baxter *vs.* Winooski Turnpike Co., 22 *Vt.*, 114; s. c., 52 *Am. Dec.*, 84, 89.

An allegation of the conclusion of law which the omitted fact was essential to make out was held not enough to sustain the complaint against such a motion, in
Sheridan *vs.* Jackson, 72 *N. Y.*, 170.

[2]Sheridan *vs.* Jackson, 72 *N. Y.*, 170, affi'g 10 *Hun*, 89. And it will be so treated on appeal, if plaintiff excepts to a dismissal instead of amending. *Ib.* Whether the motion can be denied because the answer contains the matter which the defendant objects has not been alleged, is disputed. Compare Miller *vs.* White, 4 *Hun*, 62; s. c., 6 *Supm. Ct.* (*T. & C.*), 255, and Leon *vs.* Bernheimer, 10 *Weekly Dig.*, 288, on the one hand; and Smith *vs.* Van Ostrand, 64 *N. Y.*, 278, 280, and Russell *vs.* Mayor, etc., of N. Y., 1 *Daly*, 263, on the other.

2. — *several defendants.*—If the action is against more than one defendant the objection may be made on behalf of any one or more of them as to whom sufficient facts are not stated, and the complaint dismissed as to him or them.

Montgomery County Bank *vs.* Albany City Bank, 7 *N. Y.*, 459.

3. — *specifying the ground.*—The motion should specify the defect with sufficient clearness to enable plaintiff to amend.

See Higgins *vs.* Newtown, etc., R. R. Co., 66 *N. Y.*, 604; aff'g 3 *Hun*, 611.
Robbins *vs.* Woolcott, 66 *Barb.*, 63.
Rector *vs.* Clark, 78 *N. Y.*, 21; rev'g 12 *Hun*, 189.

4. — *exception to ruling.*—The granting of the motion, when the complaint is bad and the motion is seasonably made and amendment is not made, is not matter of discretion, but of legal right.[1] But if the defect is one proper for amendment, subsequent proof of the omitted facts cures error in denying the motion to dismiss.[2]

[1] Tooker *vs.* Arnoux, 76 *N. Y.*, 397.
And see Clift *vs.* Rodger, 25 *Hun*, 39, 43.
Compare, however, Clark *vs.* Crego, 51 *N. Y.*, 646; aff'g 47 *Barb.*, 599.

[2] Lounsbury *vs.* Purdy, 18 *N. Y.*, 515.
Morton *vs.* Pinckney, 8 *Bosw.*, 135.

5. — *amending to defeat the motion.*—The Court has power to allow the defect to be supplied by amendment to defeat the motion,[1] if the amendment does not substantially change the cause of action,[2] nor make the case one requiring a different mode of trial.[3] But defendant should be allowed to amend also to meet the new allegations,[4] and to have an adjournment if surprised.

[1] Woolsey *vs.* Trustees of Rondout, 4 *Abb. Ct. App. Dec.*, 639.
Simmons *vs.* Lyons, 55 *N. Y.*, 671; aff'g 35 *Super. Ct.* (*J. & S.*), 554.
Bauman *vs.* Bean (*Mich.*, 1885), 23 *Northw. Rep.*, 451 (with disapproval of the practice of dismissing on the pleadings when no demurrer was taken. COOLEY, J.).

[2] Same cases.

[3] Bockes *vs.* Lansing, 74 *N. Y.*, 437; aff'g 13 *Hun*, 38.
Stevens *vs.* Mayor, etc., of N. Y., 84 *N. Y.*, 296.

[4] See Union Bank *vs.* Mott, 11 *Abb. Pr.*, 42.

6. — *motion, when to be made.*—The appropriate time for a motion to dismiss the complaint for insufficiency is before the case is opened or before evidence adduced; but the Court may entertain such a motion at any stage of the case[1] before evidence supplying the defect is heard.[2] If the motion to dismiss is not made until after the evidence is in, it should not be granted merely for insuffi-

ciency of the complaint, if the cause of action is proved and defendant has not been surprised or prejudiced.[3]

[1] Scofield *vs.* Whitelegge, 49 *N. Y.*, 259; s. c., 12 *Abb. Pr., N. S.*, 320; aff'g 10 *id.*, 104.

[2] Perkins *vs.* Giles, 53 *Barb.*, 342. The reason is the Court is not bound to try an action where no cause is alleged. The motion was made (and sustained on appeal) in Sheridan *vs.* Jackson, 72 *N. Y.*, 170, after admissions of fact had been made by plaintiff (10 *Hun*, 89, 90); and in Smith *vs.* Van Ostrand, 64 *N. Y.*, 278, after some evidence had been given under the complaint, but none under the answer.

[3] Miller *vs.* White, 8 *Abb. Pr., N. S.*, 46; s. c., less fully, 57 *Barb.*, 504 (rev'd, on another ground, in 50 *N. Y.*, 137).

Rector *vs.* Clark, 78 *N. Y.*, 21; rev'g 12 *Hun*, 189.

7. *Defendant's motion to dismiss because of admitted defense.*—The Court may entertain a motion at the trial for dismissal of the complaint on the ground that a defense is admitted on the pleadings.

Plaintiff is not confined to a special motion before trial for judgment.

Bridge *vs.* Payson, 5 *Sandf.*, 210.

Even if the admission claimed is inferred from the ambiguity or informality of an allegation or denial.

Clark *vs.* Dillon, 15 *Abb. N. C.*, 265; Millville Mfg. Co. *vs.* Salter, *id.*, 305.

[*Contra*, Green *vs.* Raymond, 14 *Weekly Dig.*, 322.]

8. *Plaintiff's motion for judgment for insufficiency of answer.*—If defendant has not in his answer denied either of the allegations in the complaint, and has not alleged new matter sufficient to constitute a defense, the plaintiff, if a cause of action is sufficiently alleged in his complaint, is *prima facie* entitled to recover without giving evidence of the truth of his allegations.

Bacon *vs.* Cropsey, 7 *N. Y.*, 195.

Eaton *vs.* Wells, 82 *N. Y.*, 576; aff'g 22 *Hun*, 123.

United States *vs.* Dashiel, 4 *Wall.*, 182, 185.

Whatever the system of pleading may be, it can hardly justify or require the Court to give an instruction contrary to law. NELSON, J., *ib.*

And see Grocers' Bank *vs.* Murphy, 9 *Daly*, 510, and cas. cit.

9. *Motion to compel election.*—If incompatible causes of action or defenses[1] are stated in the same pleading, the Court may, at the trial,[2] compel the party to elect between them.

But an objection to the restating of the same contract or grievance in different forms or under different aspects, cannot avail to exclude evidence at the trial.[3]

[1] Southworth *vs.* Bennett, 58 *N. Y.*, 659.

[2] *Ib.*

[3] Gillett *vs.* Borden, 6 *Lans.*, 219, 221.

Tregent *vs.* Maybee, 51 *Mich.*, 191; s. c., 19 *Northw. Rep.*, 962.

Kelly *vs.* Bernheimer, 3 *Supm. Ct.* (*T. & C.*), 140.

American Dock and Improvement Co. *vs.* Staley, 40 *Super. Ct.* (*J. & S.*), 539.

A party ought not to be compelled to elect before evidence has been given, between two causes of action or defenses, unless they are absolutely inconsistent, that is to say incompatible; nor even when they are, if his case be such that he is entitled to a discovery, at the trial, as to the facts necessary to enable him to elect. The present practice sanctions a pleader in asking alternative relief on the same facts; and in supporting the same claim by stating facts in several counts or causes of action, although success upon one will supersede any right to recover on the other phase of his claim. The inconsistency which is ground for compelling election is an absolute incompatibility in the facts alleged, not a mere superfluity of grounds for recovery, nor a mere alternative in legal results arising on such doubts as it may be a part of the object of the trial to investigate and determine. But on this question rulings adverse to this view have often been made.

Compare, for instance, Walters *vs.* Continental Ins. Co., 5 *Hun*, 343.

Roberts *vs.* Leslie, 46 *Super. Ct.* (*J. & S.*) 76.

Comstock *vs.* Hoeft, 1 *Month. L. Bul.*, 43.

Brinkman *vs.* Hunter, 73 *Mo.*, 172.

Chicago & Alton R. R. Co. *vs.* Smith, 10 *Ill. App.*, 359.
Clapp *vs.* Campbell, 124 *Mass.*, 50.
Sullivan *vs.* Fitzgerald, 12 *Allen* (*Mass.*), 482.
Gardner *vs.* Locke, 2 *Civ. Pro. R.* (*Browne*), 252.
Dickens *vs.* N. Y. Cent. R. R. Co., 13 *How. Pr.*, 228, and cas. cit.
Lake Shore & M. S. R. R. Co. *vs.* Warren, 6 *Pac. Rep.*, 724 (classifying conflicting authorities).

The better opinion is that where a plaintiff has really two distinct and separate grounds for claiming the relief demanded in the complaint, and states each one therein separately and plainly, or where he is somewhat uncertain as to the exact ground of recovery the proof may afford, he may frame a complaint for the recovery of a single claim in several distinct counts or statements, and the Court will not compel him to elect between them.

So held, in an action against an insurance company for the loss of property by fire, the complaint alleging, *first*, the issue of a policy thereon, and, *second*, a contract by defendant to insure and to issue a policy.
Velie *vs.* Newark City Ins. Co., 12 *Abb. N. C.*, 309; s. c., 65 *How. Pr.*, 1.

To the same effect in a negligence case.
Railway Co. *vs.* Hedges (*Ohio Com., June*, 1884), 11 *Weekly Law Bul.*, 326.

In Bruce *vs.* Burr, 67 *N. Y.*, 237, it is held that the Code (§ 150) allows a defendant to put in as many defenses or counterclaims as he may have, and the objection of inconsistency between them is not available. In this case the exception was to the referee's refusal to compel defendant to elect between his original defense (which was rescission for false representations) and a defense added by leave of Court (viz., a counterclaim for false warranty). It was held not error to refuse to compel defendant to elect. It is not held that if the allegations of fact had been incompatible it would have been error to compel election.

The Courts are never bound to give a party time both to prove and disprove the same thing.

10. *Misjoinder.*—The misjoinder of causes of action or defenses not appropriate to be united in the same pleading, unless they are such as to require different modes of trial, is not an incompatibility within the above

rule, and will not sustain a motion at the trial to compel the party to elect.[1]

[1] Lee Bank *vs.* Kitching, 7 *Bosw.* 664; s. c., 11 *Abb. Pr.*, 435.
Sherman *vs.* Inman Steamship Co., 26 *Hun*, 107.
s. p., Blossom *vs.* Barrett, 37 *N. Y.*, 434.
Woodman *vs.* Davis, 32 *Kans.*, 344; s. c., 4 *Pac. Rep.*, 263.

11. *Assessing damages.*—When the Court direct judgment on the pleadings the jury may, under the direction of the Court, assess the damages.

N. Y. Code Civ. Pro., § 1183, last clause.

IV.—THE RIGHT TO OPEN AND CLOSE.

1. Who entitled to.
2. Application of the rule.
3. — several issues.
4. — several defendants.
5. Defendant's right by virtue of admission in pleading.
6. Admission offered at the trial.
7. Unessential allegation.
8. Plaintiff's right by admitting defendant's case.
9. Refusal of the right, error.
10. Duty to begin.

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1. *Who entitled to.*—If plaintiff has to give any evidence in order to be entitled to a verdict for the amount claimed, he has the right to begin by opening the case to the jury and adducing his evidence first.

This is the only sound rule under the New Procedure. It is fully established in practice in the State of New York, and, I believe, is also in force, or has been recognized in principle to a greater or less extent, in the States indicated below, as well as in England.

England—
Mercer *vs.* Whall, 5 *Q. B.* (*Ad. & E.*), 447; 48 *Eng. Com. L.*, 447; s. c., 9 *Jur.*, 576.

Arkansas—
Sillivant *vs.* Reardon, 5 *Ark.*, 140.
Pogue *vs.* Joyner, 7 *id.*, 462, 466.
Pierce *vs.* Lyman, 28 *id.*, 550.
Bertrand *vs.* Taylor, 32 *id.*, 470, 476.

Georgia—
McKibbon *vs.* Folds, 38 *Geo.*, 235.

Indiana—
City of Aurora *vs.* Cobb, 21 *Ind.*, 492, 509.
Baltimore & O. R. R. Co. *vs.* McWhinney, 36 *id.*, 436, 444.
Fetters *vs.* Muncie Nat. Bk., 34 *id.*, 251.
Camp *vs.* Brown, 48 *id.*, 575.
But held otherwise in actions of tort in Indiana. Heilman *vs.* Shanklin, 60 *id.*, 424.

Kansas—
Perkins *vs.* Ermel, 2 *Kans.*, 325.

Maine—
Johnson *vs.* Josephs, 75 *Me.*, 544, where the rule is clearly stated.

Nebraska—
Rolf *vs.* Pillond, 16 *Nebr.*, 21; s. c., 19 *Northw. Rep.*, 615.

New York—
See cases cited under next point, and Katz *vs.* Kuhn, 9 *Daly*, 166, as qualified in 32 *Moak's Eng.*, 276, n.

North Carolina—
Love *vs.* Dickerson, 85 *N. C.*, 5.

Ohio—
Dille *vs.* Lovell, 37 *Ohio St.*, 415 (a well considered case).

Virginia—
Young *vs.* Highland, 9 *Gratt.* (*Va.*), 16 (a well considered case).

Vermont—
See reasoning in Goss *vs.* Turner, 21 *Vt.*, 437.

It has been held in *Alabama*, *California*, *Maryland* and *Massachusetts*, that the plaintiff has the right to open and close in all cases.
Chamberlain *vs.* Gaillard, 26 *Ala.*, 504.
Benham *vs.* Rowe, 2 *Cal.*, 387; s. c., 56 *Am. Dec.*, 342.
Brooke *vs.* Townshend, 7 *Gill*, 10, 25.
Dorr *vs.* Tremont Bk., 128 *Mass.*, 349.

Except in Maryland, in an avowry for rent in replevin, where the practice was said to be not uniform.

Page *vs.* Osgood, 2 *Gray* (*Mass.*), 260.

The books abound in conflicting authorities under the common law procedure, where it was sought to settle the question on theoretic considerations, and in view of artificial rules of pleading which often made it difficult to determine who had the affirmative. The question who has the affirmative of the issue, if it be applied as the test, will generally lead to the above conclusion; but as there are cases in which a legal presumption supplies the place of evidence to establish that affirmative, and other cases in which the party having the negative has the burden of giving evidence because the facts are peculiarly within his knowledge, that rule does not serve as a guide to the right to open and close, unless close attention is paid to its exceptions. The little volume of *Best on the Right to Begin*, an admirable analysis of conflicting authorities and deduction of resulting rules, is not a safe guide under the New Procedure.

The only substantial question raised by the recent American authorities touching this point is whether the necessity of evidence in order to establish the amount of damages, when the existence of a cause of action is admitted, entitles the plaintiff to begin, or whether he must, in such case, wait until defendant has adduced evidence in support of his justification or other affirmative defense. The latter has been held to be the rule in *Illinois*, *Indiana*, *New Hampshire*, *South Carolina and Kentucky*.

Chicago, Burlington, etc., R. R. Co. *vs.* Bryan, 90 *Ill.*, 126, 134.

McLees *vs.* Felt, 11 *Ind.*, 218, 220 (and see *above*).

Seavy *vs.* Dearborn, 19 *N. H.*, 351.

Moses *vs.* Gatewood, 5 *Rich.* (*S. C.*), 234.

M'Kenzie *vs.* Milligan, 1 *Bay* (*S. C.*), 248.

Goldsberry *vs.* Stuteville, 3 *Bibb* (*Ky.*), 345.

But when a plaintiff has to prove his cause of action as well as his damages, he is required to give his evidence on both points while presenting his case in chief, and cannot reserve his evidence as to damages until rebuttal. Where an admission takes the place of evidence as to the cause of action, the rule of convenience in respect to proving damages remains unchanged. It has been said in support of the other view that when a cause of action is admitted, it is then for defendant to attempt to establish his justification or other affirmative defense, and if

he fails the case stands as if there were a default, and plaintiff can thereupon give evidence to assess his damages. The fallacy of this is that if defendant gives any substantial evidence in support of his affirmative defense it cannot be known whether he has sustained it or not until the verdict is received. Hence, the most convenient time practically to prove damages is also the most appropriate theoretically,—before defendant opens; and if defendant wishes the right to begin he should be held to admit all that plaintiff has any right to prove under his pleading.

The test formerly stated, and sometimes repeated even in cases under the New Procedure, that the party against whom judgment would go if no evidence were given has the right to begin, is not a safe guide under the New Procedure, for now partial defenses may be pleaded; and if a partial defense is the only defense, plaintiff would be entitled to judgment if no evidence were given, but nevertheless, if the partial defense is only a traverse of a part of his complaint or allegations of damage, he is entitled to give evidence, and therefore to open and close in order that he may recover the full amount claimed.

The simple rule stated in the text will readily solve all controversies as to the right to begin, due attention being given to the following considerations:

2. *Application of the rule.*—This rule applies even where plaintiff has only to prove damages,[1] whether general[2] or special.

[1] Fry *vs.* Bennett, 28 *N. Y.*, 324; affirming 3 *Bosw.*, 200.
Littlejohn *vs.* Greeley, 13 *Abb. Pr.*, 41, 45.
Huntington *vs.* Conkey, 33 *Barb.*, 218.
Johnson *vs.* Josephs, 75 *Me.*, 544.

[2] Opdyke *vs.* Weed, 18 *Abb. Pr.*, 223, note.
Hecker *vs.* Hopkins, 16 *Abb. Pr.*, 301, note.

Under the New Procedure matter of aggravation of damages may be pleaded, for every fact of which evidence may be given at the trial is material and may be pleaded.
Millington *vs.* Loring, 29 *W. R.*, 207.
See also Stetson *vs.* Croskey, 52 *Penn. St.*, 230.

But the mere computation of interest is not matter of evidence within the rule.
Huntington *vs.* Conkey, 33 *Barb.*, 218.
Brennan *vs.* Security Life Ins., etc., Co., **4 *Daly***, 296.

The reason is that it is a deduction of law and not a question of fact; but the facts on which the right to interest depends are matter for evidence.

3. — *several issues.*—If defendant's pleading raises several issues, plaintiff is entitled to the right to begin if he has any proof to give under any of them.

Montgomery *vs.* Swindler, 32 *Ohio St.*, 224, 226.
Slauson *vs.* Englehart, 34 *Barb.*, 198.

The rule was the same at common law.
Jackson *vs.* Pittsford, 8 *Blackf.* (*Ind.*), 194.
Bowen *vs.* Spears, 20 *Ind.*, 146, 147.
Buzzell *vs.* Snell, 25 *N. H.* (4 *Fost.*), 474.
Lexington, etc., Ins. Co. *vs.* Paver, 16 *Ohio*, 324.

But the right of the Court in such case to sever the issues, and give the opening and closing to each party accordingly, was recognized in
Central Bank *vs.* St. John, 17 *Wis.*, 157; and
Vuyton *vs.* Brenell, 1 *Wash. C. Ct.*, 467.

4. — *several defendants.*—Where there are several defendants the Court may properly require the plaintiff to begin, if he has a right to begin as against any defendant.

Sodousky *vs.* McGee, 4 *J. J. Marsh.* (*Ky.*), 267 (a well considered case).
And see Kirkpatrick *vs.* Armstrong, 79 *Ind.*, 384.
Katz *vs.* Kuhn, 9 *Daly*, 166; justly qualified by Mr. Moak in 32 *Moak's Eng.*, 276, n.

5. *Defendant's right by virtue of admission in pleading.*—Defendant's pleading does not entitle him to begin, unless, when taken as a whole, it unqualifiedly admits every material allegation of plaintiff's pleading.[1]

[1] Thus in an action for goods sold, an admission of the purchase, coupled with an allegation that defendant agreed to pay, not in money but in merchandise, is, though in form new matter, in effect only a denial of the contract as alleged.
Bradley *vs.* Clark, 1 *Cush.* (*Mass.*), 293.
Gilland *vs.* Lawrence, 13 *Weekly Dig.*, 372.

So in an action for price of services or goods an allegation of negligence or deficiency in quality, stated as a ground for recoupment, does not admit the cause of action.
Fiedeldey *vs.* Reis, 12 *Cin. Law Bul.*, 76.
Citing Simmons *vs.* Green, 35 *Ohio St.*, 104.
Graham *vs.* Gautier, 21 *Tex.*, 111 (an action for damages for malpractice). This question is still contested.
Penhryn Slate Co. *vs.* Meyer, 8 *Daly*, 61.
Howard *vs.* Hayes, 47 *Super. Ct.* (*J. & S.*), 89.
But compare Stronach *vs.* Bledsoe, 85 *N. C.*, 473.

For other illustrations see
Goodpaster *vs.* Voris, 8 *Iowa*, 334.
Lindsley *vs.* European Petroleum Co., 10 *Abb. Pr., N. S.*, 107; s. c., 41 *How. Pr.*, 56.
Vance *vs.* Vance, 2 *Metc.* (*Ky.*), 581.
Thompson *vs.* Mills, 39 *Ind.*, 528, 534.

Whether an allegation which is in form new matter, but is in fact inconsistent with a material allegation of the complaint, is to be deemed a denial under the New Procedure, is a question on which there is much difference of opinion.
Compare with above cases 8 *Abb. N. Y. Dig.* (*new ed., vol. 2 of Supp.*), 509, §§ 184, 185.

The better view is that for the purpose of determining the right to begin, the admission of plaintiff's case which defendant relies on, must be explicit and not obscure; and that if his answer gives an inconsistent version merely, without an express denial, he may be required to make an express admission of plaintiff's version as a condition of claiming the right to begin. Argumentative denials, and affirmative statements which imply a denial, have generally been held to leave the right to begin with plaintiff.
Haines *vs.* Kent, 11 *Ind.*, 126.
Denny *vs.* Booker, 2 *Bibb* (*Ky.*), 427.
Thurston *vs.* Kennett, 22 *N. H.* (2 *Fost.*), 151.
Churchill *vs.* Lee, 77 *N. C.*, 341.
Beatty *vs.* Hatcher, 13 *Ohio St.*, 115.
But compare
City of Aurora *vs.* Cobb, 21 *Ind.*, 492.
Patton *vs.* Hamilton, 12 *id.*, 256.
Hoxie *vs.* Greene, 37 *How. Pr.*, 97.
De Graff *vs.* Carmichael, 13 *Hun*, 129.

6. *Admission offered at the trial.*—Defendant has the right to begin, if by leave of Court he withdraws or strikes out all denial from his pleading,[1] or if he makes

an unqualified,[2] oral[3] or written admission,[4] conceding all[5] that the plaintiff would need to prove to entitle him to recover the amount claimed.

Attorney or counsel has implied authority to make such admission.[6]

But it is not enough to admit[7] that plaintiff has a *prima facie* case, supposing that defendant should fail to establish his affirmative defense. The admission must be of the facts.[8]

[1] Harvey *vs.* Ellithorpe, 26 *Ill.*, 418.

[2] An admission coupled with a contingency is not enough.
Camp *vs.* Brown, 48 *Ind.*, 575.
In this case the action was on a note including reasonable attorneys' fee, and an admission that a specified sum would be reasonable if plaintiff should be found entitled to recover the whole amount of the note, was held insufficient to entitle defendant to begin.

[3] To the contrary was Johnson *vs.* Wideman, *Dudley* (*So. Car.*), 325, where it was held that the admission must be of record, before trial. To same effect was Gray *vs.* Cottrell, 1 *Hill* (*So. Car.*), 26. But the practice under the New Procedure does not require this. Plaintiff, however, should see that the admission is entered in the minutes.

[4] Campbell *vs.* Roberts, 66 *Geo.*, 733.
City of Aurora *vs.* Cobb, 21 *Ind.*, 492, 509.
Katz *vs.* Kuhn, 9 *Daly*, 166.

[5] Bertrand *vs.* Taylor, 32 *Ark.*, 470, 476.
Burroughs *vs.* Hunt, 13 *Ind.*, 178, 180.

[6] See Oliver *vs.* Bennett, 65 *N. Y.*, 559.
Oscanyan *vs.* Arms Co., 103 *U. S.* (15 *Otto*), 261.
And compare pp. 11, 12 of this brief, Par. 15, note 2, with Arthur *vs.* Homestead Fire Ins. Co., 78 *N. Y.*, 462; s. c., 34 *Am. R.*, 550.

[7] Wigglesworth *vs.* Atkins, 5 *Cush.* (*Mass.*), 212. The rule of Court referred to in this last case is to be found in 8 *Cush.*, 603, n.

[8] It is not enough that plaintiff has obtained an auditor's report in his favor, for he may or may not use it.
Snow *vs.* Batchelder, 8 *Cush.* (*Mass.*), 513.
Nor if he does use it, does it change the right to begin, if its conclusion is impugned by defendant.
Chesley *vs.* Chesley, 37 *N. H.*, 229.

It is said in Sanders *vs.* Johnson, 6 *Blackf.* (*Ind.*), 50; s. c., 36 *Am. Dec.*, 564, that if plaintiff has been compelled to keep his witnesses in attendance till after commencing to swear the jury, it is unreasonable to deprive him of the privilege of opening.

7. *Unessential allegation.*—An allegation not essential to the party's recovery of the amount claimed, need not be admitted by the other in order to entitle the latter to the right to begin.[1] The fact that a party has alleged what he has not the burden of proving in order to recover, does not entitle him to begin.[2]

[1] Thus where plaintiffs sued for goods sold by them jointly, their allegation that they were partners, though it is relevant, and, it may be, material, in case plaintiff has to give evidence, is not essential to enable them to recover the amount claimed; and hence, an admission of the sale, though coupled with a denial of the partnership, is a sufficient admission within the rule.

Millerd *vs.* Thorn, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr.*, *N. S.*, 371.

So a demand in the answer for the production of an instrument, a copy of which is annexed to the complaint, coupled with an admission of the genuineness of the original, does not change the rule.

Murray *vs.* N. Y. Life Ins. Co., 85 *N. Y.*, 236; s. c., 9 *Abb. N. C.*, 309; rev'g 19 *Hun*, 350.

Nor does defendant's denial of an allegation not essential to recovery, but relevant only as anticipating and avoiding an expected defense.

List *vs.* Kortepeter, 26 *Ind.*, 27.

But compare Fry *vs.* Bennett, 28 *N. Y.*, 324; aff'g 3 *Bosw.*, 200, where it was held that an allegation of malice in the publication of an article apparently privileged was one which plaintiff had a right to prove, and had therefore a right to begin for the purpose of proving.

[2] Millerd *vs.* Thorn, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr.*, *N. S.*, 371.

Claflin *vs.* Baere, 28 *Hun*, 204,—where the allegation was defendant's allegation, in form as a separate defense, that the goods were sold on a credit which had not expired; for this was in legal effect only a denial of part of plaintiff s case.

8. *Plaintiff's right by admitting defendant's case.*—Where defendant would be entitled to begin under the foregoing rules, yet nevertheless if the plaintiff, by a reply admitting and avoiding defendant's allegation of new matter, or by an unqualified oral admission at the trial, concedes all that defendant would have to prove in order to entitle himself to a verdict, or to a reduction of plaintiff's recovery to the full extent which defendant has claimed, then plaintiff has the right to begin.

Viele *vs.* Germania Insurance Co., 26 *Iowa*, 9.
Brown *vs.* Kirkpatrick, 5 *So. Car.*, 267.
Love *vs.* Dickerson, 85 *N. C.*, 5.
Judah *vs.* Vincennes University, 23 *Ind.*, 272.
Bowen *vs.* Spears, 20 *id.*, 146.
Mann *vs.* Scott, 32 *Ark.*, 593, 596.
Richards *vs.* Nixon, 20 *Pa. St.*, 19.

9. *Refusal of the right, error.*—An exception lies to the refusal of the right to begin.

Tobin *vs.* Jenkins, 29 *Ark.*, 151.
James *vs.* Kiser, 65 *Geo.*, 515.
Colwell *vs.* Brower, 75 *Ill.*, 516.
Chicago, Burlington & Q. R. R. Co. *vs.* Bryan, 90 *id.*, 126, 134.
Shank *vs.* Fleming, 9 *Ind.*, 189.
Judah *vs.* Vincennes University, 23 *id.*, 272, 284.
Denny *vs.* Booker, 2 *Bibb (Ky.)*, 427.
Johnson *vs.* Josephs, 75 *Me.*, 544.
Millerd *vs.* Thorn, 56 *N. Y.*, 402; s. c., 15 *Abb. Pr., N. S.*, 371.
Opper *vs.* Caillon, 9 *Weekly Dig.*, 39; s. c., 9 *Daly*, 157.
Murray *vs.* N. Y. Life Ins. Co., 9 *Abb. N. C.*, 309; s. c., 85 *N. Y.*, 236; rev'g 19 *Hun*, 350.
Hudson *vs.* Wetherington, 79 *N. C.*, 3.
Stronach *vs.* Bledsoe, 85 *id.*, 473.
And see 22 *Moak's Eng.*, 739.
[*Contra*, Day *vs.* Woodworth, 13 *How. (U. S.)*, 363.
Hall *vs.* Weare, 92 *U. S.* (2 *Otto*), 728.
Goodpaster *vs.* Voris, 8 *Iowa*, 334.]

The error of refusal is not cured by allowing the claimant the closing address.
Penhryn Slate Co. *vs.* Meyer, 8 *Daly*, 61.

10. *Duty to begin.*—The party who has the right to begin may be required to do so; and, if he refuse, the other party may rest on the admission which gave the right to begin, and take a verdict accordingly.

What amounts to a waiver of the right.
See Goodwin *vs.* Hirsch, 37 *Super. Ct.* (*J. & S.*), 503.
Merrill *vs.* Calcagnino, 8 *Weekly Dig.*, 487.
De Graff *vs.* Carmichael, 13 *Hun*, 129.

V.—THE OPENING.

1. Limits of the opening.
2. — rehearsing evidence.
3. — exception.
4. Reading the pleadings.
5. Motion to dismiss, or for verdict, on the opening.

1. *Limits of the opening.*—The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts, and the substance of the evidence counsel is about to introduce.

Plaintiff's counsel in opening, may also state the nature of the defense, if it appears upon the record,[1] and the manner in which he proposes to disprove it.[2]

[1] Ayrault *vs.* Chamberlain, 33 *Barb.*, 229.

The English practice of anticipating the defense does not prevail with us. Our rule does not require, and should not allow, an opening in respect to the defense, except in an incidental way by a brief statement of its general character. *Ib.*

[2] 1 *Burrill's Pr.*, 234.

2. — *rehearsing evidence.*—Counsel has not a right to state intended evidence in detail, nor to read documents he proposes to offer, so as to get matter before the jury without opportunity for the Court to decide on its admissibility.[1]

But he may state the material facts he relies on, and in so doing may refer to documents to refresh his memory.

[1]Scripps *vs.* Reilly, 35 *Mich.*, 371; s. c., 24 *Am. Rep.*, 575.

3. — *exception.*—An exception lies to allowing counsel to go beyond the above limits in opening.

Such exceptions should be sustained if a verdict is obtained apparently in consequence of the error.
Scripps *vs.* Reilly, 38 *Mich.*, 10.
Porter *vs.* Throop, 47 *Mich.*, 313; s. c., 11 *Northw. Rep.*, 174.
Rickabus *vs.* Gott, 51 *Mich.*, 227; s. c., 16 *Northw. Rep.*, 384.
And see Ayrault *vs.* Chamberlain, 33 *Barb.*, 229.

4. *Reading the pleadings.*—It is a matter of discretion with the judge, whether he will allow the pleadings to be read to the jury except so far as they have first been put in evidence. If they contain irrelevant allegations, raising issues improper for the jury's consideration, it is proper to prohibit them from being read.

The *reason* is that the pleadings are for the Court; the counsel may be required to read them or state their substance, if necessary, to enable the Court to understand the issues raised or the materiality of evidence offered; but the facts stated in them, except so far as admitted, cannot be considered until put in evidence.

Willis *vs.* Forrest, 2 *Duer*, 310.
S. P., Drew *vs.* Andrews, 8 *Hun*, 23.
Compare Garfield *vs.* Knight, 14 *Cal.*, 35.

The right to read the adverse party's pleading in evidence against him is another matter.

5. *Motion to dismiss, or for verdict, on the opening.*—If counsel's opening discloses a fatal objection to his action or defense, or if he expressly puts his case solely on a ground untenable in point of law, the Court may refuse to hear evidence in support of it, and dismiss the complaint or direct a verdict.[1]

To justify granting such a motion the admission must be one which is necessarily fatal to the case.[2]

It is not good practice to grant such a motion unless the opening has been taken down by the stenographer, or the statements relied on are noted in writing.

[1]Familiar practice, and sustained more or less expressly in Oscanyan *vs.* Arms Co., 103 *U. S.* (13 *Otto*), 261. Ward *vs.* Jewett, 4 *Robt.*, 714.

[Not allowed in Wisconsin.
Smith *vs.* Commonw. Ins. Co., 49 *Wisc.*, 322; s. c., 5 *Northw. Rep.*, 802.]

The reason is that the Court ought not to spend time in hearing evidence of facts that will not sustain an action. If the Court is one in which a nonsuit cannot be ordered without plaintiff's consent, a verdict may be directed. Oscanyan *vs.* Arms Co. (*above*).

[2]Stewart *vs.* Hamilton, 3 *Robt.*, 672; s. c., 18 *Abb. Pr.*, 298; 28 *How. Pr.*, 265.
Emmerson *vs.* Weeks, 58 *Cal.*, 382.

VI.—ORDER OF PROOF.

1. Each side in turn must exhaust his case.
2. Anticipatory rebuttal.
3. Right of rebuttal.
4. Defendant's right of reply.
5. Receiving conditionally on promise to connect.
6. — precluding offer by admitting fact.
7. Exhausting witnesses and subjects.
8. Limits of cross-examination.
9. — of party testifying in own behalf.
10. Cross-examination at large.
11. Several defendants.
12. Counterclaim.
13. Reopening.

1. *Each side in turn must exhaust his case.*—As a general rule, he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case; then the evidence of the adversary is heard, and finally the party who had the opening may introduce rebutting

evidence which merely serves to answer or qualify his adversary's case. [1]

Rebutting evidence within this rule means not all evidence whatever which contradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirmative case or fact which defendant has attempted to prove.[2] Neither side ought to be permitted to give evidence by piecemeal.

This rule does not prevent a party who has closed his case from supporting it further by the cross-examination of his adversary's witnesses,[3] nor from using parts of documents which the adversary has put in for the purpose of using other parts against him.

And the judge has discretionary power to receive evidence in chief during the rebuttal.[4]

[1] Braydon *vs.* Goulman, 1 *Monr.* (*Ky.*), 115.
Silverman *vs.* Foreman, 3 *E. D. Smith*, 322.
Pettibone *vs.* Derringer, 4 *Wash. C. Ct.*, 215.
Gilpins *vs.* Consequa, *Pet. C. Ct.*, 85; s. c., 3 *Wash. C. Ct.*, 184.
Macullar *vs.* Wall, 6 *Gray*, 507.
Hathaway *vs.* Hemingway, 20 *Conn.*, 195.

[2] Silverman *vs.* Foreman, 3 *E. D. Smith*, 322 (opin. by WOODRUFF, J.), approved in Marshall *vs.* Davies, 78 *N. Y.*, 414, 420; rev'g 16 *Hun*, 606.
And see reasoning in Goss *vs.* Turner, 21 *Vt.*, 437.

[3] It is competent for a party, after having closed his case, so far as relates to the evidence, to introduce additional evidence, by the cross examination of the witnesses on the other side, for the purpose of more fully proving his case.
Commonwealth *vs.* Eastman, 1 *Cush.* (*Mass.*), 189.

[4] Hastings *vs.* Palmer, 20 *Wend.*, 225.
Ford *vs.* Niles, 1 *Hill*, 300 (COWEN, J.).
Marshall *vs.* Davies, 78 *N. Y.*, 414, 420; rev'g 16 *Hun*, 606.
Agate *vs.* Morrison, 84 *N. Y.*, 672.
Braydon *vs.* Goulman, 1 *Monr.* (*Ky.*), 115.
State *vs.* Alford, 31 *Conn.*, 40.
Walker *vs.* Walker, 14 *Geo.*, 242.
State *vs.* Fox, 25 *N. J. L.*, 566.

In Maine, it appears to be of course to allow the party to give cumulative evidence after closing, unless notified then by the judge that he will not be allowed to do so.
Dane *vs.* Treat, 35 *Me.*, 198.

The rule is not strictly applied in New Hampshire.
Pierce *vs.* Wood, 23 *N. H.*, 519.

In Vermont, plaintiff having rested with a *prima facie* case is allowed to support it further during rebuttal.
Clays *vs.* Ferris, 10 *Vt.*, 112.

Unless defendant gave no contrary evidence.
Pingry *vs.* Washburn, 1 *Aik.* (*Vt.*), 264; s. c., 15 *Am. Dec.*, 676.

2. *Anticipatory rebuttal.*— A party may properly be allowed, as part of his case in chief, to give evidence to rebut matter which his adversary avows an intention of relying on;[1] but he is not required to do so.[2] If he does so, he makes it part of his case, and further evidence on the point is not, of right, allowable in rebuttal.[3]

[1] York *vs.* Pease, 2 *Gray* (*Mass.*), 282.
Williams *vs.* De Witt, 12 *Ind.*, 309.
Bancroft *vs.* Sheehan, 21 *Hun*, 550.
Dunn *vs.* People, 29 *N. Y.*, 523 (the avowal here was in answer to a question put by the judge).
Dimick *vs.* Downs, 82 *Ill.*, 570, 572.
Dictum to contrary, in U. S. *vs.* Clifford, 1 *Cliff.*, 98.

[2] Bancroft *vs.* Sheehan, 21 *Hun*, 550.

[3] Holbrook *vs.* McBride, 4 *Gray* (*Mass.*), 282.
Williams *vs.* De Witt, 12 *Ind.*, 309, where it was held error to allow it, citing 21 *Eng. Com. L.*, 21.

3. *Right of rebuttal.*—A party has a right, in rebuttal, to give evidence which tends to meet the affirmative case, if any, sought to be established by his adversary, and it is error to refuse it;[1] and it is no objection to such evidence that it incidentally tends also to corroborate the party's case in chief,[2] nor that it may necessitate allowing the adverse party a sur-rebuttal.[3]

[1] Bancroft *vs.* Sheehan, 21 *Hun*, 550 (judgment reversed for exclusion of such evidence).

[2] Chadbourn *vs.* Franklin, 5 *Gray* (*Mass.*), 312 (opinion by Shaw, Ch. J.).

[3] Scott *vs.* Woodward, 2 *McCord* (*So. Car.*), 161.

4. *Defendant's right of reply.*— After plaintiff's rebuttal defendant has a right in reply to give evidence which tends to meet the affirmative case, if any, or any new and distinct fact, sought to be established by plaintiff's rebuttal, which defendant had not opportunity of meeting in his case in chief; and it is error to refuse it.

Asay *vs.* Hay, 89 *Penn. St.*, 77. The Court say: Had it been competent for the defendant to prove in chief what he offered in rebuttal the Court might have refused a re-examination of the witness. As to matters that require explanation, or as to new matter introduced by the opposing interest, a party has a right in rebuttal to re-examine his witnesses.

Kent *vs.* Lincoln, 32 *Vt.*, 591.

The rule in Vermont, however, strictly excludes evidence in reply on any point defendant has already had full opportunity to meet.
Thayer *vs.* Davis, 38 *Vt.*, 163.

So held even where the evidence was, incidentally at least, cumulative, but the plaintiff could not have been prejudiced.
Walker *vs.* Fields, 28 *Geo.*, 237.

In contradicting the adversary's evidence that a particular interview was had, testimony that no such interview ever occurred, does not let in evidence in rebuttal that such an interview was had at another time.
Marshall *vs.* Davies, 78 *N. Y.*, 414, 420.

5. *Receiving conditionally on promise to connect.*— If evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the Court may receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterward.

U. S. *vs.* Flowery, 1 *Sprague*, 109; s. c., 8 *Law R.*, 258.
Deery *vs.* Cray, 10 *Wall*, 263.
Place *vs.* Minster, 65 *N. Y.*, 89 (conspiracy).
First Unitarian Soc. *vs.* Faulkner, 91 *U. S.* (1 *Otto*), 415.

But if the evidence does not prove relevant, the judge's instructions may perhaps not cure the error.

6. — *precluding offer by admitting fact.*—Upon a conclusive admission of fact being made by counsel, the Court may in its discretion exclude an offer of further evidence of the fact admitted,[1] unless the offer goes beyond the admission.[2]

But this does not extend to shutting off strict cross-examination.[3]

[1] Dorr *vs.* Tremont Bank, 128 *Mass.*, 349.
Bannister *vs.* Alderman, 111 *id.*, 261 (holding it no error to rule either way).
Ainsworth *vs.* Hutchins, 52 *Vt.*, 554.
Butterworth *vs.* Pecare, 8 *Bosw.*, 671.

The *reason* is, the Court is not bound to spend time in taking evidence and ruling on a point which is not controverted. But the power to refuse should be sparingly used.

It is not error to admit the evidence.
Hancock Mut. Life Ins. Co. *vs.* Moore, 34 *Mich.*, 41.

"It would be absurd to hold that any party, by his bald admissions on a trial, could shut out legal evidence."
Kimball, etc., Mfg. Co. *vs.* Vroman, 35 *Mich.*, 310.

[2] As for instance, where the offer is to show circumstances, manner, etc., as being relevant in aggravation.
See also Priest *vs.* Groton, 103 *Mass.*, 540.

That a party is not bound to take a disclaimer of damages, as reason for excluding evidence,
See Brown *vs.* Perkins, 1 *Allen* (*Mass.*), 89, 96.

[3] Berger *vs.* Clippert (*Mich.*, 1884), 19 *Northw. Rep.*, 149.

7. *Exhausting witnesses and subjects.*—It is proper to require a party calling a witness to complete his examination exhaustively, before calling another;[1] but it is error to refuse to allow a witness whose examination has been closed to be recalled for a rebuttal which involves a new subject, or a contradiction of what there was not opportunity to contradict on the direct.[2]

Subject to this rule, it is not improper to require a party adducing evidence upon a subject to exhaust all his evidence as to that subject before proceeding to another;[3]

and whether, after giving evidence on another part of his case, he shall be permitted to return and resume the former subject, is in the discretion of the Court.

[1]People *vs.* Mather, 4 *Wend.*, 229, 249.
Treadwell *vs.* Goodwin, 6 *Bosw.*, 538, 549.
Beaulieu *vs.* Parsons, 2 *Minn.*, 37.

[2]Jones *vs.* Smith, 64 *N. Y.*, 180, 184.

[3]Rowe *vs.* Brenton, 3 *Mann. & Ry.*, 133, 139.

8. *Limits of cross-examination.*—A party has not a right, before his adversary's case is closed, to introduce his own case to the jury by cross-examining the witness of his adversary on matters beyond the limit of the direct-examination of such witness.[1]

The limit of a strict cross-examination within the meaning of this rule includes whatever tends to qualify or explain his direct testimony, or rebut or modify any inference resulting from it.[2]

[1]Houghton *vs.* Jones, 1 *Wall.*, 702.

"The cross-examination of a witness must be limited to matters stated in his direct examination." *Ib.*, per FIELD, J.
Phila. & Trenton R. R. Co. *vs.* Stimpson, 14 *Pet.*, 448, 461 (leading case).
Neil *vs.* Thorn, 88 *N. Y.*, 275.
Ellmaker *vs.* Buckley, 16 *Serg. & R.*, 72.
Bell *vs.* Prewitt, 62 *Ill.*, 362.
Pellersells *vs.* Allen, 56 *Iowa*, 717; s. c., 10 *Northw. Rep.*, 261.
Cool *vs.* Roche, 15 *Nebr.*, 24; s. c., 17 *Northw. Rep.*, 119 (holding that direct examination as to possession merely, does not entitle to inquire on cross-examination as to the right by which it was held).
[*Contra*, Moody *vs.* Rowell, 17 *Pick*, 490; s. c., 28 *Am. Dec.*, 317, 323 (SHAW, Ch. J.).]

[2]Wilson *vs.* Wagar, 26 *Mich.*, 452.
Campau *vs.* Dewey, 9 *id.*, 381, 419.
Haynes *vs.* Ledyard, 33 *id.*, 319.
Ferguson *vs.* Rutherford, 7 *Nev.*, 385.
And see for instances Baird *vs.* Daly, 68 *N. Y.*, 547, 550.
Mayer *vs.* People, 80 *N. Y.*, 364, 378.

9. — *of party testifying in own behalf.*—A greater latitude is allowable in the cross-examination of a party who testifies on his own behalf; but even there the limits of the cross-examination, beyond the scope of the direct, is in the discretion of the judge.

Rea *vs.* Missouri, 17 *Wall.*, 542.

10. *Cross-examination at large.*—It is in the discretion of the Court, in controlling the order of proof, to allow cross-examining counsel to go beyond the limits of strict cross-examination and introduce matters in support of his own case.

Neil *vs.* Thorn, 88 *N. Y.*, 270, 276 (*dictum*).

[*Contra*, Bell *vs.* Prewitt, 62 *Ill.*, 362 (reversing judgment for allowing cross-examination at large).]

11. *Several defendants.*—Where there are several defendants, having separate defenses, it is in the discretion of the judge in what order they shall cross examine, present their case and sum up.[1]

If their interests are identical, they may be confined to one counsel in so doing for all, as if their defense was joint.[2]

[1] Fletcher *vs.* Crosbie, 2 *M. & Rob.*, 417.

[2] Chippendale *vs.* Masson, 4 *Camp.*, 174.
Mason *vs.* Ditchbourne, 1 *M. & Rob.*, 462, n.

12. *Counterclaim.*—Where a counterclaim is interposed, beside denials or other defenses to the cause of action, it is in the discretion of the Court to try both together, or to postpone defendant's evidence as to his counterclaim, including his examination of plaintiff thereon, until after the close of plaintiff's case.

Thompson *vs.* Woodfine, 38 *L. T. R., N. S.*, 753; s. c., 26 *Weekly R.*, 678; 47 *L. J., Ch.*, 832.

13. *Reopening.*—Even after both parties have rested, the admission or exclusion of further evidence is in the discretion of the judge.[1] But an exception may be taken, and if the ruling be an abuse of discretion relief may be had.[2]

On reopening the case the Court may prescribe the extent and limits thereof;[3] and, after taking further evidence has been commenced, a party has a right to complete it,[4] but not to go beyond the limits prescribed.[5]

[1] Williams *vs.* Hayes, 20 *N. Y.*, 58.
Caldwell *vs.* N. J. Steamboat Co., 47 *N. Y.*, 282, 295; aff'g 56 *Barb.*, 425.
Phil., etc., R. R. Co. *vs.* Stimpson, 14 *Pet.*, 448.

Even if the further testimony be the re-examination of a witness who has once been examined.
People *vs.* Rector, 19 *Wend.*, 569.

The English rule, which is somewhat more strict than the American, still allows that if a party is taken by surprise at the statements made by the other side, on a point that is relevant, and which he has had no opportunity of meeting, and on which there has been no cross-examination, the Court have power to reopen the case, and even a witness already examined may be recalled.
Rogers *vs.* Manley, 42 *L. T. R., N. S.*, 584.
Citing *Tayl. Ev.*, 6 *ed.*, par. 359, p. 392.

[2] Meyer *vs.* Cullen, 54 *N. Y.*, 392.
Meacham *vs.* Moore, 59 *Miss.*, 561.
Compare, as to remedy, 1 *Graham's Pr.*, 3 *ed.*, 740.
Owen *vs.* O'Reilly, 20 *Mo.*, 603.

[3] State *vs.* Harris, 63 *N. C.*, 1.

[4] Mobile F. D. Ins. Co. *vs.* Parsons, 11 *Weekly Dig.*, 414.

[5] Stephens *vs.* Fox, 83 *N. Y.*, 313; aff'g 17 *Hun*, 435.

VII.—OFFERS OF EVIDENCE AND OBJECTIONS.

[To sustain an exception to the rejection of evidence counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what was intended. If he leaves the offer fairly open to two constructions he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferrible that he was so understood by the judge who rejected the evidence.]

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1. Offer in hearing of jury.
2. Offer without putting question.
3. Calling for disclosure—before swearing witness.
4. — before putting question.
5. Offer of document.
6. — of part of series or complex document.
7. Necessity of promise to connect.
8. Opening the door for adversary —by error, without objection.
9. — by offer or challenge.
10. Opening the door for one's self.
11. Opening the door for adversary—by error, against objection.
12. Retracting.
13. Right to call for ground of objection.
14. Cross-examining as to competency.
15. — counter proof.
16. — arguing.

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1. *Offer in hearing of jury.*—If offered evidence be oral the offer is necessarily oral, and may be made notwithstanding the presence and hearing of the jury.[1] If it be documentary, the judge may require that the document be submitted to him to determine its admissibility before being allowed to be read in the presence of the jury, against objection.[2]

[1] But reiterated offers in their hearing, after exclusion, should not be tolerated.
Scripps *vs.* Reilly, 38 *Mich.*, 10.

[2] Gould *vs.* Weed, 12 *Wend.*, 12, 24.
Scripps *vs.* Reilly, 38 *Mich.*, 10.
Keedy *vs.* Newcomer, 1 *Md.*, 241.

The judge should not permit reading to him as an indirect way of letting the jury hear.
Philpot *vs.* Taylor, 75 *Ill.*, 309, 312.

Reading in the hearing of the jury held not error, in Brill *vs.* Flagler, 23 *Wend.*, 353.

2. *Offer without putting question.*—An offer of oral evidence may be refused if the witness is not present in Court,[1] and circumstances indicate that the offer is not made in good faith.[2]

[1] Robinson *vs.* State, 1 *Lea* (*Tenn.*), 673.
Eschbach *vs.* Hurtt, 47 *Md.*, 61, 66.

[2] Scotland County *vs.* Hill, 112 *U. S.*, 183, 186.

3. *Calling for disclosure—before swearing witness.*—The Court may, as a condition of allowing a witness to be sworn or examined, require counsel, if able to do so, to state the substance of what he proposes to prove by him.[1]

If no request or disclosure be made, it is error to refuse to allow a witness to be sworn, if he was competent to testify to anything, although he may have been incompetent as to other things.[2]

[1] Roy *vs.* Targee, 7 *Wend.*, 358.

But the Court should always listen to reasons offered for not making such disclosure. *Ib.*

[2] Beal *vs.* Finch, 11 *N. Y.*, 128, 135.
Brown *vs.* Richardson, 20 *id.*, 472.

It was expressly held in Haussknecht *vs.* Claypool, 1 *Black*, 431, that it is not essential to state that the witness is a material witness, though to do so is more in conformity with the usual practice (see 1 *Black*, 435, where judgment was reversed for error in exclusion).
[*Contra*, Stewart *vs.* Kirk, 69 *Ill.*, 509.
And see Railroad Company *vs.* Smith, 21 *Wall.*, 255, 261.
Louisville, etc., R. R. Co. *vs.* Sullivan, 5 *Ky. L. Rep. & J.*, 722.]

4. — *before putting question.*—If a question calls for evidence which may or may not be relevant or material, the adverse party may require that counsel state the substance of what he proposes to prove,[1] and if he refuse to do so the question may be excluded.[2]

But this rule does not apply to strict cross-examination.[3]

[1]First Baptist Church *vs.* Brooklyn Fire Ins. Co., 23 *How. Pr.*, 448, 450, affirmed on the merits, 28 *N. Y.*, 153.
United States *vs.* Gibert, 2 *Sumn.*, 19.
Fairchild *vs.* Case, 24 *Wend.*, 380.
Morgan *vs.* Browne. 71 *Penn. St.*, 130, 136.

[2]Same cases.

[3]O'Donnell *vs.* Segar, 25 *Mich.*, 367, 372.
Martin *vs.* Elden, 32 *Ohio St.*, 282.
Batten *vs.* State, 80 *Ind.*, 394; s. c., 7 *Weekly Cin. L. B.*, p. 125 *of Supp.*
Stanton Co. *vs.* Canfield, 2 *Nebr.*, 28; s. c., 6 *Northw. Rep.*, 466.
[*Contra*, U. S. *vs.* Gilbert, 2 *Sumn.*, 19. Story, J.]

5. *Offer of document.*—Under a general offer of a document and its reception in evidence without objection or qualification, the whole document is deemed in evidence, for all purposes;[1] and including indorsements thereon such as may be deemed connected with the contents.[2]

[1]Miles *vs.* Loomis, 75 *N. Y.*, 285; s. c., 31 *Am. R.*, 470; aff'g 10 *Hun*, 372.

Hence the party who so introduced it cannot impeach any part of it.
Machlin *vs.* New Engl. Life Ins. Co., 33 *La. Ann.*, 801; s. c., 12 *Rep.*, 657.
Hewett *vs.* Buck, 17 *Me.*, 147; s. c., 35 *Am. Dec.*, 243.

[2]Bell *vs.* Keefe, 12 *La. Ann.*, 340.

6. — *of part of series or complex document.*—Under an offer of a particular document forming an integral part of a complex document, produced entire, and its reception without objection or qualification,—such as an offer and reception of a notary's protest without mentioning a certificate of notice attached thereto, or an offer and reception of a pleading contained in a judg-

ment roll, produced without mentioning the judgment, etc.,—the particular document offered is alone deemed in evidence for the party offering it,[1] subject, however, to the right of the adverse party to read the other connected papers (but so far only as they qualify the paper offered),[2] if their genuineness appears, or if it was assumed by the offer.

[1] Marchand *vs.* Coffee, 23 *La. Ann.*, 442.

[2] Abbott *vs.* Pearson, 130 *Mass.*, 191.

7. *Necessity of promise to connect.*—He who offers evidence, the competency of which depends upon other evidence being given to establish it, must make it appear that it will be competent by stating what he expects to prove, and if he does not do so when objection is made, it is not error to exclude the evidence.

Mechelke *vs.* Bremar, 59 *Wisc.*, 57; s. c., 17 *Northw. R.*, 682.
Piper *vs.* White, 56 *Penn. St.*, 90.
Hall *vs.* Patterson, 51 *id.*, 289.
Bilberry's admr. *vs.* Mobley, 21 *Ala.*, 277.
Van Buren *vs.* Wells, 19 *Wend.*, 202.
Abney *vs.* Kingsland, 10 *Ala.*, 355; s. c., 44 *Am. Dec.*, 491, and cas. cit.
Carnes *vs.* Platt, 15 *Abb. Pr., N. S.*, 337; s. c., 36 *Super. Ct.* (*J. & S.*), 361; aff'd in 55 *N. Y.*, 405.

8. *Opening the door for the adversary,—by error, without objection.*—Where irrelevant evidence has been received with out objection, it is not error to allow the adverse party to give evidence to meet it.[1] So if one party introduce evidence upon a point immaterial as matter of law, but not objected to as immaterial, the other side may be allowed to rebut it.[2]

Yet, on the other hand, it is not error to refuse to receive equally irrelevant evidence to meet it,[3] except where the evidence received gave a right to contradict for purpose of impeachment, or was calculated to make an impression on the jury which instructions from the

Court could not efface,[4] and which the offered evidence tends to remove.

[1] Blossom *vs.* Barrett, 37 *N. Y.*, 434 438.
Havis *vs.* Taylor, 13 *Ala.*, 324.
Hale *vs.* Philbrick, 47 *Iowa*, 217; mem. s. c., 7 *Rep.*, 717.

But the practice disapproved, and held not error to exclude such evidence, Walkup *vs.* Pratt, 5 *Har. & J.* (*Md.*), 51.

The giving of an incompetent kind of evidence,—such as oral, to vary written,—is a waiver of the right to object to the adversary's doing likewise.
Shaw *vs.* Stone, 1 *Cush.* (*Mass.*), 228, 243.

[2] Waldron *vs.* Romaine, 22 *N. Y.*, 368, 371.
Furbush *vs.* Goodwin, 25 *N. H.* (5 *Fost.*), 425.
Weiting *vs.* Shearer, 8 *Weekly Dig.*, 392.
Findley *vs.* Pruitt, 9 *Port.* (*Ala.*), 195.
Patton *vs.* Cities of Phil. & N. O., 1 *La. Ann.*, 98.
s. p., recognized in Scattergood *vs.* Wood, 79 *N. Y.*, 263; s. c., 35 *Am. R.*, 515.

So if a party who, while testifying in his own behalf, volunteers an irrelevant statement, no question on the point being asked, it is not error to receive contrary evidence from the other party.
Brown *vs.* Perkins, 1 *Allen* (*Mass.*), 89, 96.

"The defendant opened the door for the testimony and cannot complain that it was not closed soon enough to suit him."
Sherwood *vs.* Titman, 55 *Penn. St.*, 77.
[*Contra*, Mitchell *vs.* Sellman, 5 *Md.*, 376.]

This is not error, even though allowed as independent testimony, not merely by way of contradiction.
Sherwood *vs.* Titman, 55 *Penn. St.*, 77.
[*Contra*, McCartney *vs.* Nebraska, 1 *Nebr.*, 121.]

[3] Farmers & Manfrs. Bk. *vs.* Whinfield, 24 *Wend.*, 419.
Stringer *vs.* Young, 3 *Pet.*, 320, 337.
Phila. & Trenton R. R. Co. *vs.* Stimpson, 14 *id.*, 448.
Manning *vs.* Burlington, etc., R. R. Co. (*Iowa*, 1884), 20 *Northw. Rep.*, *N. S.*, 169.
[*Contra*, Thompson *vs.* Brothers, 5 *La.*, 279.]

A party has not the right to give immaterial evidence, because his adversary has done so before him.
(Per Folger, Ch. J.) People *vs.* Dowling, 84 *N. Y.*, 478, 486.

[4] Wallis *vs.* Randall, 81 *N. Y.*, 164, 167; aff'g 16 *Hun*, 33.
And see Stringer *vs.* Young, 3 *Pet.*, 320, 337.
S. P., Scales *vs.* Shackleford, 64 *Geo.*, 170.

9. — *by offer or challenge.*—An offer to allow the other party to prove that which might be objected to under the pleadings,[1] or a challenge to him to do so,[2] followed by a responsive offer of such proof, is a waiver of the right to object.

[1] Adams *vs.* Farnsworth, 15 *Gray* (*Mass.*), 423, 426.

[2] Rundell *vs.* Butler, 10 *Wend.*, 119.

10. *Opening the door for one's self.*—A party who puts in illegal evidence not objected to by the other party cannot complain that he is not allowed to follow it with other such evidence,[1] even to confirm[2] or explain it.[3]

[1] Lyons *vs.* Teal, 28 *La. Ann.*, 592.

[2] Trenton Mut. Life & F. Ins. Co. *vs.* Johnson, 24 *N. J. L.* (4 *Zabr.*), 576, 579.

[3] Brand *vs.* Longstreet, 4 *N. J. L.* (1 *South.*), 325.

11. *Opening the door for adversary,—by error, against objection.*—Where improper evidence has been received against objection and exception, the refusal to receive contrary evidence on the same point is error, which will not be disregarded by the appellate court, unless they can see that the improper evidence could not have influenced the jury.

Ward *vs.* Washington Ins. Co., 6 *Bosw.*, 229.

An unequal application of the rules of evidence which might have prejudiced the case, such as allowing opinion evidence offered by one party and excluding evidence of the same character on the same point offered by the other, is ground of reversal.
Holten *vs.* Holten, 5 *Weekly Dig.*, 14.

12. *Retracting.*—If a party, after causing a witness to be sworn, or a deposition to be taken, refuses to

examine the witness or read the deposition, the other party has the right to do so, but the evidence which the latter adduces by so doing will be his own, within the rule forbidding him to impeach it.[1]

One who has put a question has a right to withdraw it before any answer is given.

[1] Musick *vs.* Ray, 3 *Metc.* (*Ky.*), 427 (where a party refused to read his own cross-examination in a deposition, and the Court, after allowing the adverse party to read it, allowed him also to contradict it; and this was held error).

13. *Right to call for ground of objection.*—A party whose evidence is objected to may require the grounds of objection to be specified in detail, sufficiently to enable him to remedy it, if remediable.

Milliken *vs.* Barr, 7 *Penn. St.*, 23.
Harris *vs.* Panama R. R. Co., 5 *Bosw.*, 312.

Where, as in Pennsylvania, a general objection is sufficient unless particularity is called for (Penn. Mut. Aid Soc. *vs.* Corley, 39 *Leg. Int.*, 139; s. c., 11 *Ins. L. J.*, 493), the policy of counsel is to call for the ground. Otherwise, often in those jurisdictions where a general objection does not avail, in error or on appeal, if the ground of the objection is such that it could have been obviated had it been disclosed.

14. *Cross-examining as to competency.*—When objection to the competency of evidence arises upon the examination of a witness, the objector has a right to interpose with cross-examination upon the facts material to the question of competency.

First Nat. Bk. of Easton *vs.* Wirebach, 14 *Rep.*, 606; s. c., more fully, 12 *Weekly N. C.*, 150 (expert witness; held error to refuse such preliminary cross-examination).
s. p., Maurice *vs.* Worden, 54 *Md.*, 233.
Trussell *vs.* Scarlett, 18 *Fed. Rep.*, 217, note.

15. — *counter proof.*—On an objection to the competency, either of testimony or a document, the Court

may allow the objector to interpose with other evidence upon the facts material to it;[1] or, if the question be identical with one in issue, and a *prima facie* case of competency is made out by the party offering the evidence, the Court may (after allowing cross-examination, if the proposed evidence be testimony, or a document introduced by testimony) receive the evidence, subject to the right of the adverse party to move to strike it out and have the jury instructed to disregard it, if he shall in due course rebut the apparent competency.

[1] Maurice *vs.* Worden, 54 *Md.*, 233 (so held notwithstanding an express rule of Court giving plaintiff the opening).
Trussell *vs.* Scarlett, 18 *Fed. Rep.*, 214.
Commonwealth *vs.* Howe, 9 *Gray*, 110 (holding that when a judge hears evidence on a question preliminary, he should hear all, even though it be a question which more properly should go to the jury).
[*Contra*, Verzan *vs.* McGregor, 23 *Cal.*, 339; holding it error to receive counter-proof on the competency of a document before allowing it to be read to the jury. To the same effect, though conceding the tendency to confuse the jury by not allowing it, is Crenshaw *vs.* Jackson, 6 *Geo.*, 509; s. c., 50 *Am. Dec.*, 361.]

The true rule is, that it is in the sound discretion of the Court to pursue either course, as stated in the text.

16. — *arguing.*—When a question of the admissibility of evidence is duly raised, the party have a right to be heard in argument. But a refusal of the right of argument is not error, if the ruling though without argument be correct.[1] The Court may, in its discretion, hear the argument in the presence[2] or in the absence of the jury.

[1] Olive *vs.* State of Nebraska, 11 *Nebr.*, 1; s. c., 7 *Northw. Rep.*, foot page, 451.

[2] State *vs.* Wood, 53 *N. H.*, 484.

VIII.—RULING ON OFFERS AND OBJECTIONS.

[A statement of objection not indicating its ground is not sufficient to require exclusion, unless the objection be of such a nature that it could not be obviated, or it appear that the party making the offer could not have avoided the ground of objection had it been specifically stated.

But it is not error to sustain such a general objection if any sufficient ground for it exists, provided that no request be made that the ground be specified].

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1. Questions, how tried.
2. Conditional admission.
3. Objections—authorities in support of strict rules.

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1. *Questions, how tried.*—Whether evidence is admissible or not is a question of law for the Court;[1] and questions of fact incidental to its determination are also for the Court to determine for that purpose,[2] even where they are identical with questions at issue for the jury to pass on.[3]

If the incidental question be in doubt when the evidence is offered, the judge may decide it on the evidence as it then stands;[4] or, if the question be identical with one in issue, may admit the evidence if it be such that the jury might rationally infer the fact, and leave to them the question what influence it should have, with proper instructions as to the doubt respecting its competency.[5]

[1] Columbian Ins. Co. *vs.* Lawrence, 2 *Pet.*, 25.
Carter *vs.* Bennett, 4 *Fla.*, 283.
De France *vs.* De France, 34 *Penn. St.*, 385.
Davis *vs.* Charles River Branch R. R. Co., 11 *Cush.* (*Mass.*), 506 (question whether a communication was not made by way of compromise and therefore inadmissible. Here it was held error to leave it to the jury).

[2]Reynolds *vs.* Lounsbury, 6 *Hill*, 534 (question whether a witness had an interest that disqualified him).

Currier *vs.* Bank of Louisville, 5 *Coldw.* (*Tenn.*), 460 (same question).

Tabor *vs.* Staniels, 2 *Cal.*, 240 (same question. Here it was held error for the judge to leave the question to the jury).

Robinson *vs.* Terry, 11 *Conn.*, 460 (same question. Here it was held error for the judge to leave the question to the jury).

Harris *vs.* Wilson, 7 *Wend.*, 57 (question whether one whose admission or declaration was sought to be proved, was a partner of him against whom it was offered).

Cliquot's Champagne, 3 *Wall.*, 114 (question whether there was sufficient proof of agency to admit the supposed agent's acts and declarations against the principal).

Jones *vs.* Tucker, 41 *N. Y.*, 546 (question whether a witness was competent as an expert).

First Nat. Bank of Easton *vs.* Wirebach, 14 *Rep.*, 606; s. c., more fully, 12 *Weekly N. C.*, 150 (same question).

Ratliff *vs.* Huntly, 5 *Ired.* (*N. C.*) *L.*, 545 (question whether there was a writing such as to preclude oral evidence.)

The rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, applies to the question of preliminary proof to lay a foundation for further evidence or to connect declarations with the party sought to be charged.

Pleasants *vs.* Fant, 22 *Wall.*, 116.

[3]Scherpf *vs.* Szadeczky, 1 *Abb. Pr.*, 366.
Prall *vs.* Hinchman, 6 *Duer*, 351.
Reynolds *vs.* Lounsbury, 6 *Hill*, 534.
Scovell *vs.* Kingsley, 7 *Conn.*, 284.

[4]Scherpf *vs.* Szadeczky, 1 *Abb. Pr.*, 366.

[5]Verzan *vs.* McGregor, 23 *Cal.*, 339 (question whether a memorandum made after signing a contract was part of it).

Winslow *vs.* Bailey, 16 *Me.*, 319 (question whether document was used fraudulently).

Bartlett *vs.* Hoyt, 33 *N. H.*, 151 (question whether a communication was not made by way of compromise, and therefore inadmissible).

Swearingen *vs.* Leach, 7 *B. Mon.* (*Ky.*), 285 (agency; a well-reasoned case).

"A contrary practice would in many instances take the whole case from the jury and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions." *Ib.*

To exclude the evidence where the preliminary fact was such that a jury might rationally infer it, was held error. *Ib.*

To the same effect, Funk *vs.* Kincaid, 5 *Md.*, 404.

Where the evidence on which the admissibility of the fact depended had already gone to the jury, *held*, error to refuse to submit the other to them also.

Day *vs.* Sharp, 4 *Whart.*, 339; s. c., 34 *Am. Dec.*, 509.

In Emerson *vs.* Prov. Hat Mfg. Co., 12 *Mass.*, 237; s. c., 7 *Am. Dec.*, 66, it was held that the question of agent's authority to sign, if arising on a writing, was for the Court; if oral, for the jury; but this was because the action was on the contract, and the execution of it was the very question in issue.

The case of Porter *vs.* Wilson, 13 *Penn. St.*, 641, well explains the distinction between such a case and the cases where the fact of authority is only preliminary to evidence on a collateral issue.

2. *Conditional admission.*—It is irregular to allow evidence objected to, to go to the jury, reserving the question of its competency for further consideration,[1] except when allowed in the discretion of the Court upon the assurance of counsel that he will give evidence to connect.

[1] McCurry *vs.* Hooper, 12 *Ala.*, 823; s. c., 46 *Am. Dec.*, 280.

3. *Objections—authorities in support of strict rules.*—Whether a trial be long or short, or the exceptions few

or many, every party has the right to demand that he shall not be prejudiced by improper evidence.[1] The admission of illegal evidence which bears in the least degree on the result is fatal.[2]

The graver the charge, the more strictly the rules of evidence should be applied.[3] It is always better and safer for a Court to err in the direction of over-strictness, in requiring from counsel adherence to rules.[4]

[1] N. Y. Guaranty & Indemnity Co. *vs.* Gleason, 7 *Abb. N. C.*, 334; s. c., 78 *N. Y.*, 503.
Worrall *vs.* Parmelee, 1 *id.*, 519, 521.

[2] Baird *vs.* Gillett, 47 *N. Y.*, 186, 188.

For the laxer rule in equity cases, see *Code Civ. Pro.*, § 1003.

[3] Blackburn *vs.* Beall, 21 *Md.*, 208.

[4] Green *vs.* Green, 26 *Mich.*, 437.

IX.—EXCEPTIONS.

1. When to be taken.
2. Anticipatory note of intended exceptions.
3. Exception to incidental remarks.

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1. *When to be taken.*—To secure the right to review, an exception must be taken at the time when the ruling or instruction objected to is given;[1] and should be then noted,[2] but if seasonably taken, the judge may allow it to be noted before the verdict,[3] but not after verdict.[4]

[1] Turner *vs.* Yates, 16 *How.* (*U. S.*), 14, 29.
Stewart *vs.* Huntington Bank, 11 *Serg. & Rawle*, 267; s. c., 14 *Am. Dec.*, 628.

[2] An exception to a ruling on a question of evidence must be taken and reduced to writing, or entered in the minutes at the time the ruling is made.
N. Y. Code Civ. Pro., § 995.

[3] Hunnicutt *vs.* Peyton, 102 *U. S.* (12 *Otto*), 333, 354.

[4] U. S. *vs.* Carey, 110 *U. S.*, 51.

2. *Anticipatory note of intended exceptions.*—A previous reservation of a right to except subsequently is not a sufficient exception.[1] A stipulation of counsel, or a direction by the trial judge to which there is no dissent, that the stenographer should enter an exception to whatever there should be an objection to, does not make a subsequent objection equivalent to an exception; but will entitle an objecting party to have an exception inserted on the settlement of the case.[2]

[1] Gregory *vs.* Dodge, 14 *Wend.*, 593; aff'g 4 *Paige*, 557.

[2] Stephens *vs.* Reynolds, 6 *N. Y.*, 454.
Briggs *vs.* Waldron, 83 *id.*, 582.

3. *Exception to incidental remarks.*—An exception lies to remarks of the judge which are in the nature of instructions to the jury, or calculated to be so understood by them;[1] but not to remarks addressed to counsel in the course of argument or ruling on applications made during the trial.[2]

[1] Daly *vs.* Byrne, 77 *N. Y.*, 182; aff'g 43 *Super. Ct.* (*J. & S.*), 261.
Caldwell *vs.* N. Y. Steamboat Co., 47 *N. Y.*, 282.

[2] In the latter class of cases the remedy is by motion for new trial.

X.—WITHDRAWING AND STRIKING OUT EVIDENCE.

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1. *Withdrawing.*—One who has adduced evidence against objection, by calling forth a responsive answer or by reading a document, has not a right to withdraw it or have it struck out;[1] but may be allowed, in the discretion of the Court, to withdraw it, although the other party has taken an exception,[2] provided that it be wholly harmless to the other party, and the latter be allowed to have the benefit of it, in his own favor, if he desire.

If it is, or may be, injurious to the party who has excepted, it cannot be withdrawn without his consent, for he has the right to meet it.

[1] Decker *vs.* Bryant, 7 *Barb.*, 182, 189 (ALLEN, J.).
Furst *vs.* Second Ave. R. R. Co., 72 *N. Y.*, 542, 546.

[2] State of Rhode Island *vs.* Fowler, 13 *R. I.*, 661, and cases cited.
Boone *vs.* Purnell, 28 *Md.*, 607.
Providence Ins. Co. *vs.* Martin, 32 *id.*, 310.

Whether the withdrawal will cure the error is often another question.

2. *Moving to strike out—after omitting to object.*—A party who has allowed obviously incompetent evidence to be received without objection is not entitled to have it struck out, but at most to have the jury instructed to disregard it.

Quin *vs.* Lloyd, 41 *N. Y.*, 349, 355 (per WOODRUFF, J., error to strike it out; but the better view is that it is discretionary).
Marks *vs.* King, 64 *N. Y.*, 628; aff'g 1 *Hun*, 435.
Pontius *vs.* People, 82 *N. Y.*, 339; aff'g 21 *Hun*, 328.
Brockett *vs.* N. J. Steamboat Co., 18 *Fed. Rep.*, 157.

3. — *after adversary's omission.* — One who has drawn out incompetent evidence, even from his own witness, which has been received without exception being taken by his adversary, may be allowed, in the discretion of the Court, to have it struck out[1] before the case is submitted.[2]

[1] Carpenter *vs.* Ward, 30 *N. Y.*, 243, 246 (where the adversary's right to impeach was reserved).
Roberts *vs.* Johnson, 37 *Super. Ct.* (*J. & S*), 157; aff'd in 58 *N. Y.*, 613, without distinctly passing on this question: (motion granted, though made after long delay). According to Lynch *vs.* McNally, 7 *Daly*, 126, the motion must be immediately made (aff'd in 73 *N. Y.*, 347, without passing on the question).

[2] Farmers' Bk. *vs.* Cowan, 2 *Abb. Ct. App. Dec.*, 88.

4. — *after unsuccessful objection.*—A party against whose objection and exception evidence has been received, because apparently competent[1] or upon the faith of a promise to connect,[2] is not, on subsequently establishing its incompetency, or on failure to connect, entitled as matter of right to have it struck out, but only to have the jury instructed to disregard it. But the Court may, in their discretion, grant a motion to strike it out.[3]

[1] Gawtry *vs.* Doane, 51 *N. Y.*, 84; aff'g 48 *Barb.*, 148 (notary's certificate afterward shown void by extrinsic evidence).

[2] Marks *vs.* King, 64 *N. Y.*, 628; aff'g 1 *Hun*, 435.
Platner *vs.* Platner, 78 *N. Y.*, 90.

[3] Stokes *vs.* Johnson, 57 *N. Y.*, 673.

The motion ought to be granted where the evidence is so prejudicial that instructions would not remove its effect.
Anderson *vs.* Rome, W. & O. R. R. Co., 54 *N. Y.*, 334.
O'Sullivan *vs.* Roberts, 39 *Super. Ct.* (*J. & S.*), 360.

Or where evidence to meet it has been excluded on the ground that the point is immaterial.
Gilbert *vs.* Cherry, 57 *Geo.*, 128.

Or where its remaining in is sought to be used as a foundation for further evidence not otherwise admissible.

5. *Delay in moving.*—Omission to object to the evidence at the time is not fatal to a motion to strike it out at any time before the close of the evidence, if the delay is shown to have been from mistake or inadvertence; but the discretion should be carefully exercised, so that no harm may come to the other party.[1] If the motion be not made with reasonable promptitude it is not error to deny it.[2]

[1] Miller *vs.* Montgomery, 78 *N. Y.*, 282, 286; aff'g in effect 3 *Redf.*, 154.

[2] Gilmore *vs.* Pittsburgh, etc., R. R. Co., 104 *Penn. St.*, 275.

6. *Power of the Court.*—Irrelevant evidence may be stricken out by the Court[1] at any stage of the cause;[2] but a party who objected and excepted to its reception, and has been prejudiced by it, still has a right to meet it.[3]

[1] Montford *vs.* Rowland, 11 *Stew. (N. J.)*, 181.

[2] Maurice *vs.* Worder, 54 *Md.* 233, 251.

[3] See, for instance, Anderson *vs.* Rome, W. & O. R. R. Co., 54 *N. Y.*, 334; and O'Sullivan *vs.* Roberts, 39 *Super. Ct. (J. & S.)*, 360.

XI.—THE USE OF THE PLEADINGS.

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1. *Reading adversary's pleading.*—The pleading of a party in the action on trial is competent evidence against him of any relevant matter of fact contained therein, and is conclusive,[1] unless the Court allow an amendment. A party whose pleading admits a conclusion of law is not thereby estopped from contesting it.[2]

[1] Cook *vs.* Barr, 44 *N. Y.*, 156, 158 (Earl, C.).

[2] People *ex rel.* Purdy *vs.* Comm'rs of Marlborough, 54 *N. Y.*, 276; s. c., 13 *Am. R.*, 581.

2. — *amending.*—The Court have a discretionary power to refuse to allow a party to amend at the trial by striking out an admission which his adversary relies on, where the applicant does not show that it was made under a mistake of fact.

Miller *vs.* Moore, 1 *E. D. Smith*, 739.

Leave to amend may be granted without prejudice to using the admission.

Kenah *vs.* Steam Tug John Markee, Jr., 3 *Fed. Rep.*, 45; s. c., 14 *Reporter*, 646.

Strong *vs.* Dwight, 11 *Abb. Pr., N. S.*, 319.

3. — *original after amendment.*—A pleading or an admission or allegation in a pleading, notwithstanding it has been withdrawn or struck from the record by amendment, is competent in evidence against the party from

whom it proceeded, like any other admission or declaration, subject, however, to explanation by him.

Strong *vs.* Dwight, 11 *Abb. Pr., N. S.*, 319 (where the pleading had been verified by the party personally).

Frearson *vs.* Loe, *L. R.*, 9 *Chan. Div.*, 48, 66; s. c., 25 *Moak's Eng.*, 747, 763 (JESSEL, M. R.).

Fogg *vs.* Edwards, 20 *Hun*, 90.

Bloomingdale *vs.* Du Rell, 1 *Idaho T.*, 33.

[*Contra*, Meecham *vs.* McKay, 37 *Cal.*, 154, and Ponce *vs.* McElvy, 51 *id.*, 222, reversing judgments for error in admitting the original after amendment; and Owens, etc., Mach. Co. *vs.* Pierce, 5 *Mo. App.*, 575, holding it not error to exclude it.]

The weight of the evidence is another question. It was justly said in Elizabethport Mfg. Co. *vs.* Campbell, 13 *Abb. Pr.*, 86, that a reference to original will not alone falsify statements of the amended pleading. The *prima facie* effect of amendment is an acknowledgment of mistake, and not an implication of having willfully or knowingly made a false statement.

The rule in the text rests on the general principle that whatever a party has said about his case may be proved against him.

In its application a question remains as to whether he who offers a pleading not signed or verified by the adverse party must give evidence to bring knowledge of it home to him.

According to the considered case of Vogel *vs.* Osborne (*Minn.*, 1884), 20 *Northw. Rep.*, 129, this is necessary, and without such evidence it is error to admit it.

According to Bowen *vs.* Powell, 1 *Lans.*, 1, it would be error to hold that the mere fact that the party had obtained standing in Court by a pleading not signed nor verified by him, nor otherwise brought home to him, was evidence of an admission of the truth of all contained in it.

4. — — *showing personal sanction.*—The party may be asked whether he had given the facts to his attorney or counsel, for the purpose of pleading; because, if the conversation is not called for, this does not violate the rule of privilege.

Ross-Lewin *vs.* Redfield, 68 *N. Y.*, 627.

5. — *contradicting part.*—A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it.

Mott *vs.* Consumers' Ice Co., 73 *N. Y.*, 543.
So held where plaintiff suing a master put in evidence, to show the injury, the answer alleging the act to have been the willful and not negligent act of the servant. *Held*, error to hold plaintiff estopped thereby.

See also Fogg *vs.* Edwards, 20 *Hun*, 90.

6. — *allegations in verification of adversary's pleading.*—Allegations of agency, etc., in past transactions, contained in the usual affidavit of verification, are not competent evidence of such agency against the party whose pleading is thus verified, without other evidence to connect him therewith.

Bowen *vs.* Powell, 1 *Lans.*, 1.

7. — *mere extract may be read.*—A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he do not omit a part of a sentence or clause which qualifies that part which he reads so as to pervert the sense or render it uncertain.

McDonald *vs.* McDonald, 16 *Vt.*, 630.
Bompart *vs.* Lucus, 32 *Mo.*, 123.

Thus the answer of the defendant may be read in evidence by the plaintiff in an action for conversion to prove possession of the goods by the defendant, even though defendant by his other allegations avers that such possession was lawful by virtue of a purchase of the goods from a person having title thereto, and even though such admission constitutes the only evidence of possession by defendant, and plaintiff relies on other evidence to show the wrongful possession.

Foster *vs.* Henry (*N. Y. Com. Pleas*, 1872), 5 *Alb. L. J.*, 173.

8. — *but adversary may read residue.*—When one party has read in evidence an extract from his adversary's pleadings the adversary has a right to read as much more

as may be necessary to qualify or explain that which has been read, but not an allegation of a distinct fact in avoidance.

This appears to be the sound rule and in harmony with the general principle as to putting in evidence the whole of the declaration or admission (Rouse *vs.* Whited, 25 *N. Y.*, 170; rev'g 25 *Barb.*, 279), which is properly applicable to written declarations, affidavits, etc., as well as oral.

Gratton *vs.* Metrop. Life Ins. Co., 92 *N. Y.*, 274, 284.
Honstine *vs.* O'Donnell, 5 *Hun*, 472, 474.
It was applied to a pleading in Goodyear *vs.* De La Vergne, 10 *id.*, 537, 539.

The conflict of opinion on this point may be shortly stated as the question; which should prevail, the old common law rule, that when a party has read a portion of a book or other document on his own behalf, the adverse party is entitled to read anything else from the same document; or, the modern rule as to admissions generally, that when a party proves an admission or declaration, the adverse party is entitled to prove as much of the residue as tends to explain or qualify it, but not statements of distinct matters.

The latter I deem to be the true rule applicable to the reading of pleadings as evidence, because they are read simply as admissions; and it is supported by
Gunn *vs.* Todd, 21 *Mo.*, 303.

To the contrary is Godden *vs.* Pierson, 42 *Ala.*, 370, and the head-note in Gildersleeve *vs.* Mahony, 5 *Duer*, 383, which, however, is not borne out by the decision.

See, further, on the origin of this question, 2 *Johns. Ch.*, 90; 1 *Johns.*, 580; 16 *Vt.*, 634.

9. *Reading one's own pleading,—matter in issue.*—A party is not entitled to read to the jury, from his own pleading, anything which has been put in issue, except so far as it may be necessarily read to explain a responsive pleading properly in evidence, even though the jury be instructed by the Court that it is not evidence.

The principle is well stated in Lancaster *vs.* Arendell, 2 *Heisk.* (*Tenn.*), 434, a case, however, which arose on the reading of a petition for discovery; judgment reversed for error in allowing it to be read even with such instructions.

10. — *matter admitted.*—Material allegations in a complaint which are not put in issue, or in an answer requiring a reply, and admitted by failure to reply, are competent evidence[1] in favor of the party making the allegation, except allegations as to amount of damage.[2]

[1] Lettick *vs.* Honnold, 63 *Ill.*, 335.

[2] Jennings *vs.* Asten, 5 *Duer*, 695; s. c., 3 *Abb. Pr.*, 373 (*dictum*).

The reason of this exception is, that allegations of damage are not admitted by failure to deny.

11. *Necessity of putting a pleading in evidence.*—A pleading even in the same case, which has not been put in evidence, cannot be used as evidence, even against the party who made it;[1] but it may be referred to to define the limits of his case,[2] for a fact admitted by the adversary's pleading need not be proved.[3]

[1] White *vs.* Smith, 46 *N. Y.*, 418, to the contrary, was before a referee.

[2] Fash *vs.* Third Ave. R. R. Co., 1 *Daly*, 148.

But defining the limits of the case is the province of the Court. *Ib.*

McKinney *vs.* Hartman, 4 *Iowa*, 154.

[3] Trabue *vs.* North, 2 *A. K. Marsh.* (*Ky.*), 361.

12. *Reading pleadings in another action.*—The pleading of a party in another action is competent evidence against him of any relevant[1] matter of fact contained therein if it be shown that the matter was inserted with his knowledge and sanction.[2]

[1] Neudecker *vs.* Kohlbergh, 81 *N. Y.*, 296 (holding it error to receive it when not relevant).

[2] Cook *vs.* Barr, 44 *N. Y.*, 156.

Whether his sanction can be presumed from the simple fact that the pleading was put in on his behalf, is questioned. Compare Vogel *vs.* Osborne (*Minn.*, 1884), 20 *Northw. Rep.*, 129, and cas. cit., and note to paragraph 3 (*above*).

13. *Copy not best evidence.*—If a pleading is offered in evidence as an admission of the party, his original, and not a copy or record, is the best evidence.

Nash *vs.* Hunt, 116 *Mass.*, 237, 248.

Whether the original copy served by him on the party offering it would be competent, compare Pratt *vs.* Norton, 5 *Supm. Ct. (T. & C.)*, 8.

3 *Abb. N. Y. Dig., new ed.*, p. 60, § 869, etc.

XII.—EXHIBITION, AND VIEW.

1. *Exhibiting person,—identity.*—On the trial of an issue involving the identity of a person, the Court may allow him to be brought before the jury in order that a witness may look upon him and testify.

Attorney-General *vs.* Fadden, 1 *Price*, 403 (where *hab. corp. ad test.* was allowed, to bring him up).

2. — *age,—legitimacy.*—On the trial of an issue involving the age of a child, the Court may allow the child to be shown to the jury.

N. Y. L., 1882, p. 421, c. 340; *Pen. Code*, § 19. In any proceeding, it is matter of right to exhibit the child, on a question of age.

As to legitimacy see Warlick *vs.* White, 76 *N. C.*, 175 (legitimacy of child alleged to be of mixed blood. Refusal to allow it to be exhibited, *held* error).

State *vs.* Smith, 54 *Iowa*, 104; s. c., 6 *Northw. Rep.*, 153 (child of two years or more, alleged to be a bastard, exhibition held not error), disapproved in 22 *Alb. L. J.*, 43.

Contra, State *vs.* Danforth, 48 *Iowa*, 43; s. c., 30 *Am. R.*, 387 (error to allow exhibition of child of only three months).

3. — *personal injury.*—The Court may allow a witness testifying in his own behalf respecting injuries to his person, to exhibit the injured part to the jury.[1]

Whether the Court can compel him to do so, or to submit to a medical examination in presence of the jury, is contested.[2]

[1] Hiller *vs.* Village of Sharon Springs, 28 *Hun*, 344.
Mulhado *vs.* Brooklyn City R. R. Co., 30 *N. Y.*, 370.
Jordan *vs.* Bowen, 46 *Super. Ct.* (*J. & S.*), 355.

[2] *Affirmative.*
Schroeder *vs.* Chicago, Rock Island, etc., R. R. Co., 47 *Iowa*, 375 (a well-reasoned case).
Miami & Montg. Turnpk. Co. *vs.* Bailey, 37 *Ohio St.*, 104; s. c., 6 *Weekly Cin. L. Bul.*, 395.
White *vs.* Milwaukee City R. R. Co., 61 *Wisc.*, 536; abst. s. c., 24 *Am. L. Reg.*, 150.
State *vs.* Ah Chuey, 14 *Nev.*, 79.
Hatfield *vs.* St. Paul & D. R. R. Co. (*Minn.*, 1885), 22 *Northw. Rep.*, 176.
And see State *vs.* Graham, 74 *N. C.*, 646;
Walker *vs.* State, 7 *Tex.*, 245; commented on in 15 *Cent. L. J.*, 2, 207;
Sioux City, etc., R. R. Co. *vs.* Finlayson, 16 *Nebr.*, 578; s. c., with note, 49 *Am. R.*, 724.

Negative.
Parker *vs.* Enslow, 102 *Ill.*, 272.
Newman *vs.* Third Ave. R. R. Co., 50 *Super. Ct.* (*J. & S.*), 412 (examination before trial).
s. p., Day *vs.* State, 63 *Geo.*, 667.
People *vs.* McCoy, 45 *How. Pr.*, 216 (criminal cases).

4. *Exhibiting chattel.*—On the trial of an issue involving the quality or condition of a chattel, the Court may allow the thing to be shown to the jury, upon proper evidence as to the identity of the thing and of its condition at the time in question.[1]

It is not error to refuse to compel a party to produce a chattel for such examination, even though it be in Court.[2]

[1] People *vs.* Muller, 32 *Hun*, 209; s. c., 2 *N. Y. Crim. R.*, 279 (photographs; on indictment for the sale of them, as deemed obscene).
Luie *vs.* Taylor, 3 *F. & F.*, 731.

King *vs.* New York Central, etc., R. R. Co., 72 *N. Y.*, 607 (iron hook, broken from alleged flaw. In this case some stress was laid on the fact that the question was one of common knowledge as justifying the exhibition of the object).

s. p., People *vs.* Gonzalez, 35 *N. Y.*, 49.

Ruloff's Case, 11 *Abb. Pr., N. S.*, 245; s. c., less fully, as Ruloff *vs.* People, 45 *N. Y.*, 213.

[2]Hunter *vs.* Allen, 35 *Barb.*, 42 (not error to refuse. *Dictum* that it would be error to compel it. But *query* ?)

5. — *photographs.*—On the trial of an issue involving the condition, appearance, or identity of a person,[1] place,[2] or thing[3] at a previous time, a photograph taken at the time in question is competent upon proper evidence of its fidelity.

[1]Ruloff's Case, 11 *Abb. Pr., N. S.*, 245; s. c., less fully, as Ruloff *vs.* People, 45 *N. Y.*, 213. S. P. Cowley Case, 83 *N. Y.*, 465.

[2]Cozzens *vs.* Higgins, 1 *Abb. Ct. App. Dec.*, 451.

[3]Chestnut Hill, etc., Co. *vs.* Piper, etc., Co., 15 *Weekly Notes*, 55 (holding that the fact that the photograph did not show every part of the ground did not require its exclusion).

6. *View,—statute.*—The right to send the jury out to have a view, although it may have had a common law origin, is regarded now as statutory, and it is not now the practice to grant a view, except pursuant to an express statute, or by consent.

Whether the *United States Courts* must follow the State practice on applications for view does not appear to have been settled.

If it were a mode of taking evidence the State practice would not be applicable,—see *Exp.* Fisk, 113 *U. S.*, 713, but, doubtless, it still might be allowed on consent, though consent would not make it matter of right. Considered as simply qualifying the jury to understand the evidence, the question whether the State practice controls in the United States Courts depends on the application of the distinction in Nudd *vs.* Burrows, 91 *U. S.* (1 *Otto*), 426.

When view is allowed, they follow the State practice as to expenses.

Huntress *vs.* Town of Epsom, 15 *Fed. Rep.*, 732.

7. — *object.*—A view when had, is to enable the jury to understand the evidence, not to make witnesses of them.

Wright *vs.* Carpenter, 49 *Cal.*, 607.
Close *vs.* Samm, 27 *Iowa*, 503.

Hence it is error to instruct the jury that they are to take into consideration their personal examination, like the evidence. *Ib.*

Where referees, upon the trial, inspected premises (in the presence of counsel) and based their findings upon the proofs, *and such view*,—*Held*, that if such inspection was additional ocular evidence it must appear in the case on appeal, or the appellate Court could not regard it in determining whether the findings were justified by the evidence.
Claflin *vs.* Meyer, 75 *N. Y.*, 260; s. c., 31 *Am. R.*, 467; rev'g 43 *Super. Ct.* (*J. & S.*), 1.
Compare Maxted *vs.* Seymour (*Mich.*, 1885), 22 *Northw. Rep.*, 219.
Omaha, etc., R. R. Co. *vs.* Walker (*Nebr.*, 1885), 23 *Northw. Rep.*, 348.

8. — *application.*—It is not error to allow counsel, in arguing his application for a view, to state to the judge in the hearing of the jury what they will see.

Boardman *vs.* Westchester Fire Ins. Co., 54 *Wisc.*, 364.

In Pennsylvania it is held necessary to move before trial.
Bar *vs.* Hoffman, 79 *Penn. St.*, 71.

But participating without objection waives the omission of previous motion.
Brown *vs.* O'Brien, 3 *Clark*, 115.

9. — *vacating order.*—The Court may vacate a previous order for a view upon its appearing unnecessary.

Nesbit *vs.* Kerr, 3 *Yeates*, 194.

10. — *time.*—The time when the jury shall take the view, if it be allowed, is in the discretion of the Court.

Galena, etc., R. R. Co. *vs.* Haslam, 73 *Ill.*, 494.

11. — *mode.*—If a view is demanded in a proper case, the jury should be sent in a body, in charge of a sworn officer.

Trustees of Brooklyn *vs.* Patchen, 8 *Wend.*, 47, 65, 84; aff'g 2 *id.*, 376, 384.

12. — *experiment.*—It is not matter of right to have an experiment tried in the presence of the jury, upon the ground viewed.

Smith *vs.* St. Paul City R. R. Co. (Minn., 1884), 18 *Northw. Rep.*, 827.

But allowing it by consent is not error.

Stockwell *vs.* C. C., etc., R. R. Co., 43 *Iowa*, 470.

13. — *unauthorized view.*—Misconduct of a juror in going to take a view is waived, if objection to continuing the trial before him is not promptly made, on discovery of the fact.

Stampofski *vs.* Steffens, 79 *Ill.*, 303.
Whitcher *vs.* Peacham, 52 *Vt.*, 242.

XIII.—USEFUL AUTHORITIES ON EVIDENCE.

[Under this heading, without undertaking to state the law fully, I have briefed a selection of what I deem the most useful authorities on those questions of evidence which are most frequently contested, and are not so trite but that ready reference to authority is often indispensable to correct practice at Circuit.]

Accounts.—Account books of a party, the entries in which are testified to be correct by the persons who made them, are competent in his own favor.

Ætna Ins. Co. *vs.* Weide, 9 *Wall.*, 677.

Entries made by private parties are not admissible in evidence, unless they were made contemporaneously with the facts to which they relate, by parties having personal knowledge of the facts; and are corroborated by their testimony if living and

accessible, or by proof of their handwriting, if dead, insane, or beyond reach.

Chaffee *vs.* U. S., 18 *Wall.*, 516.

And see Maxwell *vs.* Wilkinson, 113 *U. S.*, 656, and cas. cit.; Ocean Nat. Bk. *vs.* Carll, 55 *N. Y.*, 440; 9 *Hun*, 239.

When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers, and the examination cannot conveniently be made in Court, the results may be proved by the person who made the examination.

1 *Greenl. Ev.*, § 93, applied in Burton *vs.* Driggs 20 *Wall.*, 125.

The state of the account and the balance due at a given time, when collaterally involved, provable by the testimony of the person in whose books it was, without production of the books.

Lewis *vs.* Palmer, 28 *N. Y.*, 271, 278.

When complex transactions are already in evidence, statements made by experts of the result of the account, upon the several theories of the law which the case may be subject to, are competent, not necessarily as evidence of the facts stated in them, but to assist the jury in calculation.

Home Ins. Co. *vs.* Balt. Warehouse Co., 93 *U. S.* (3 *Otto*), 527, 547.

It is not error to refuse to allow a witness with the books before him to give a summary of their contents.

Von Sachs *vs.* Kretz, 72 *N. Y.*, 548, aff'g 10 *Hun*, 95

Entries in books are always explainable, and the truth of the transaction can be shown independent of them.

Boyce *vs.* The Patapsco, 13 *Wall.*, 329.

s. p., Foster *vs.* Persch, 68 *N. Y.*, 400; rev'g 6 *Daly*, 164.

Acknowledgment.—What defects in an acknowledgment preclude its admission in evidence.

15 *Abb. N. C.*, 269, *note.*

14 *id.*, 453, *note.*

[And see "*Authentication*" (*below*).]

Admissions.—The rule, that what a party has said about his case may always be proved against him, does not let in what he has said merely in the way of repetition of the sayings of others.

Stephens *vs.* Vroman, 16 *N. Y.*, 381.

The rule, that before inconsistent statements can be proved against a witness, his attention must have been called to them, with time and place, on cross-examination, does not apply where the witness is a party testifying on his own behalf.

Blossom *vs.* Barrett, 37 *N. Y.*, 434.
Lucas *vs.* Finn, 35 *Iowa*, 9.

— *of what witness would prove.*—An admission of *the facts* proposed to be proved by an absent witness is conclusive evidence against the party who prevented postponement thereby, if it be read to the jury as a part of the evidence on the trial; otherwise it cannot be considered by them.

Pannell *vs.* State, 29 *Geo.*, 681.
Lowrie *vs.* Verner, 3 *Watts* (*Pa.*), 317.

An admission that a witness, if present, would testify to specified statements, is not conclusive, either as to the competency of the witness, nor the admissibility, nor the truth, of the testimony.

State *vs.* Geddis, 42 *Iowa*, 264.
Edmonds *vs.* State, 34 *Ark.*, 720.

Nor is a consent of an adverse party, that such a statement be read to the jury, conclusive as to the truth of the statement.

Burton *vs.* Brooks, 25 *Ark.*, 215.

— *by counsel.*—A formal admission of a material fact[1] made by counsel in the course of the trial of the issues,[2] for the purpose of influencing the course of the trial,[3] is conclusive upon the client[4] for the purposes of the trial,[5] and countervails a contrary allegation or denial in his pleading, but does not supply the lack of an essential allegation or denial in either his or his adversary's pleading.[6]

[1] For instance, the amount due.
Wilson *vs.* Spring, 64 *Ill.*, 14.
Or the fact of partnership.
Oliver *vs.* Bennett, 65 *N. Y.*, 559.
An admission of *the law* does not necessarily bind the client.
Mitchell *vs.* Cotten, 3 *Fla.*, 134.
Nor does an admission that a *prima facie* case exists.
Spaulding *vs.* Hood, 8 *Cush.* (*Mass.*), 602.

[2] An admission of what an absent witness would prove, made before swearing the jury, even though made in their presence, is not enough. It should be presented as part of the evidence.
Lowrie *vs.* Verner, 3 *Watts* (*Pa.*), 317.

[3]Usually, it must have been made for the purpose of dispensing with formal proof.

Treadway *vs.* Sioux City, etc., R. R. Co., 40 *Iowa*, 526.

Starke *vs.* Kenan, 11 *Fla.*, 818.

But an admission made even in the opening, not for the purpose of dispensing with proof by the adversary, but as an avowal of inability or a disavowal of intention to prove, is enough.

Oscanyan *vs.* Arms Co., 103 *U. S.* (13 *Otto*), 263.

Admissions before trial may be proved (see 3 *Metc.* (*Ky.*), 438), their effect depending on circumstances.

[4]Even though she be a married woman.

Wilson *vs.* Spring, 64 *Ill.*, 14.

As to clients who are *non sui juris*, query? "When the rights of infants are in question, the facts cannot be established by admission" (Cooley, J., in partition); Claxton *vs.* Claxton, 21 *Northw. Rep.*, 311.

According to Mitchell *vs.* Cotten, 3 *Fla.*, 134, it is necessary that the client be present. The rule is qualified by the like intimation in Colledge *vs.* Horn, 3 *Bing.*, 119; but according to Lord Ellenborough, in Young *vs.* Wright, 1 *Camp.*, 139, the authority of attorney or counsel is presumed, and this we take to be the generally recognized rule.

[5]Oscanyan *vs.* Arms Co., 103 *U. S.* (13 *Otto*), 263.

Stanley *vs.* Northw. Mut. Life Ins. Co. (*Ind.*, Nov. 23, 1883), 13 *Ins. L. J.*, 347, 353 (95 *Ind.*, 254, appears to be a different decision).

Thompson *vs.* Thompson, 9 *Ind.*, 323.

Boston, etc., R. R. Co. *vs.* Dana, 1 *Gray* (*Mass.*), 83.

And see Arthur *vs.* Homestead Ins. Co., 78 *N. Y.*, 462; s. c., 34 *Am. R.*, 550.

It may affect other trials if in writing.

Mullin *vs.* Vt. Mut. Fire Ins. Co., 56 *Vt.*, 39; s. c., 13 *Ins. L. J.*, 908.

[6]Jackson *vs.* Whedon, 1 *E. D. Smith*, 141.

The Court may relieve the party from an admission made by his attorney or counsel on the trial, if proper explanation be made.

Oscanyan *vs.* Arms Co., 103 *U. S.* (13 *Otto*), 263.

s. p., Behr *vs.* Conn. Mut. Life Ins. Co., 4 *Fed. Rep.*, 357.

But see People *vs.* Garcia, 25 *Cal.*, 531, where it was held not error to refuse to do so.

Compare 13 *Metc.* (*Mass.*), 269.

Admission of a distinct fact, though made in the course of a negotiation for settlement, is competent.

Bartlett *vs.* Tarbox, 1 *Abb. Ct. App. Dec.*, 120.

It is not admissible if the statement cannot be separated from the offer and still convey the intended idea.

Home Ins. Co. *vs.* Baltimore Warehouse Co., 93 *U. S.* (3 *Otto*), 527.

Affidavits.—Affidavits *used by the party* in the same cause are not necessarily conclusive as evidence against him on the trial.[1]

An affidavit *made* by the party is conclusive evidence against him in any matter founded upon the proceeding sought to be contradicted or growing out of the adjudication obtained in reliance upon the affidavit, or if it has been acted on by the other party so as to raise an estoppel; otherwise it does not necessarily conclude him.[2]

Affidavits which have been *used against a party* on a former motion are not made admissible in evidence on the trial by the mere fact that he did not make an affidavit in contradiction.[3]

An affidavit of a party *in his own favor* is not made admissible by the mere fact that he has put in evidence the counter affidavit of his adversary.[4]

[1] Mather *vs.* Parsons, 32 *Hun*, 338.

[2] Maybee *vs.* Sniffen, 2 *E. D. Smith*, 1, 12, 14.

[3] Wehrkamp *vs.* Willet, 4 *Abb. Ct. App. Dec.*, 548, 555.

[4] De Graff *vs.* Hovey, 16 *Abb. Pr.*, 120.

Agency.—The admissions and declarations of an agent are not evidence of his agency unless brought home to the alleged principal.

Bacon *vs.* Johnson (*Mich.*, 1885), 22 *Northw. Rep.*, 276.

Stringham *vs.* St. Nicholas Fire Ins. Co., 4 *Abb. Ct. App. Dec.*, 315.

But the Court may in its discretion admit the declarations on assurance that evidence of agency will afterward be given.

First Unitarian Soc. *vs.* Faulkner, 91 *U. S.* (1 *Otto*), 415.

Agency cannot be shown by appearances, except in favor of one who relied on them.

People *vs.* Bank of N. A., 75 *N. Y.*, 547.

Distinction between conditional authority, and absolute authority subject to limitations peculiarly within the agent's knowledge.

Merchants' Bank of Canada *vs.* Griswold, 72 *N. Y.*, 472; s. c., 28 *Am. R.*, 159.

Attorney's interest.—Evidence that plaintiff has agreed to give his attorney a part of the recovery, is incompetent.

Sussdorf *vs.* Schmidt, 55 *N. Y.*, 319.

Courtright *vs.* Burns (*U. S. Circ., W. D., Mo.*, 1882), 14 *Cent. L. J.*, 89 (opin. by McCrary, J.).

If the attorney is a witness, such evidence is competent on his credibility, and he may be required to answer.

Moats *vs.* Rymer, 18 *W. Va.*, 642; abst. s. c., 25 *Alb. L. J.*, 276.

Alternative claims.—Where a party claims premises by two titles, either of which is good if available, he should be permitted to introduce evidence of both.

Enders *vs.* Sternbergh, 2 *Abb. Ct. App. Dec.*, 31 (holding that where a party, having proved title by deed, offered evidence of title to the same property by will, it was error to refuse to admit it, even though the title by deed was uncontroverted).

Authentication of an act.—An official authentication of an act, if not necessary to its validity, but simply to facilitate its proof, is not objectionable because made after the action was commenced.

For instance an acknowledgment of a deed.

Holbrook *vs.* N. J. Zinc Co., 57 *N. Y.*, 616.

Or the seal on letters of administration.

Maloney *vs.* Woodin, 11 *Hun*, 202.

Thus the formal entry of an order of Court, as actually declared, may be made at any time when necessary for purposes of evidence.

People *vs.* Myers, 2 *Hun*, 6.

In Seeley *vs.* Morgan, 49 *Super. Ct.* (*J. & S.*), 346, this principle was extended to the case of a corporate resolution adopted pending the trial, to evidence a ratification claimed to have been given before the action (reviewing cases).

Best and secondary evidence.—The existence of an instrument and the existence of the relation under it may be proved by parol, without producing the instrument.

Sprague *vs.* Hosmer, 82 *N. Y.*, 466, 471.

— — contents of a notice may be proved by secondary evidence, without giving notice to produce.

Eagle Bank *vs.* Chapin, 3 *Pick.*, 180, 183.

Original papers are not made merely secondary evidence by record pursuant to a statute requiring them to be filed or recorded.

Chapman *vs.* Gates, 54 *N. Y.*, 132 (County judge's order in highway proceedings).

Haddow *vs.* Lundy, 59 *N. Y.*, 320 (Surrogate's minutes).

The rule excluding secondary evidence does not apply to an incidental and collateral matter drawn out on cross-examination to test the temper and credibility of the witness, and in nowise affecting the merits of the controversy between the parties.

Klein *vs.* Russell, 19 *Wall.*, 439, 464.

Kalk *vs.* Fielding, 50 *Wisc.*, 339.

But a paper, the contents of which are sought to be used to discredit or contradict a witness, as containing his own statements contrary to his testimony, must be produced. A copy will not do.

Newcomb *vs.* Griswold, 24 *N. Y.*, 298.

Pratt *vs.* Norton, 5 *Supm. Ct.* (*T. & C.*), 8 (a certified copy assignment in bankruptcy).

S. P., Nash *vs.* Hunt, 116 *Mass.*, 237, 248 (a copy pleading).

The fact that a document is without the State is enough to let in secondary evidence without notice to produce.

Burton *vs.* Driggs, 20 *Wall.*, 125, 134.

Bronson *vs.* Tuthill, 1 *Abb. Ct. App. Dec.*, 206 (*dictum*).

The absence without the State of the instrument on which the action is brought is not an excuse for plaintiff's failure to produce it.

Shillito *vs.* Robbins, 7 *Weekly Cin. L. Bul.*, 74; citing Van Alstyne *vs.* Commercial Bank, 4 *Abb. Ct. App. Dec.*, 449.

— *foundation for seconaary:* — *loss.*—To lay a foundation for secondary evidence of the contents of a lost paper, the person last known to have had its possession must be examined as a witness to prove its loss; and even if he is out of the State his deposition must be taken or excuse shown.

Kearney *vs.* Mayor, etc., of N. Y., 92 *N. Y.*, 617.

— *notice to produce.*—Notice to produce is not necessary in case of a writing directly involved in the cause of action or defense, so that the nature of the action or the contents of the pleading in effect give notice that it will be required.

Howell *vs.* Huyck, 2 *Abb. Ct. App. Dec.*, 423.

Lawson *vs.* Bachman, 81 *N. Y.*, 616; rev'g 44 *Super. Ct.* (*J. & S.*), 396.

— — *sufficiency.*—A notice to produce is to be deemed sufficient if it fairly apprise the party of the paper wanted, though it be informal and inaccurate in particulars.

Frank *vs.* Manny, 2 *Daly*, 92.
Jones *vs.* Parker, 20 *N. H.*, 31.
U. S. *vs.* Duff (*C. Ct., So. D. N. Y.*, 1881), 11 *Rep.*, 325; s. c., 6 *Fed. Rep.*, 45.

— *quality of secondary evidence,* — *of lost document.*—Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with all the formalities required by law, and should show all the contents, not literally, but substantially.

Edwards *vs.* Noyes, 65 *N. Y.*, 125.

— — *of suppressed document.*—Parol evidence to establish the contents of an instrument which the adverse party refuses to produce on notice is competent, although vague and indistinct.

Benjamin *vs.* Ellinger, 80 *Ky.*, 472; s. c., 4 *Ky. Law Rep.* (*Frankf.*), 317.

— — *of formal document.*—Where the instrument is a familiar legal form,—*e. g.*, a judgment roll or execution—it may be presumed to have been adequate to sustain the official acts by which its existence is proved.

Mandeville *vs.* Reynolds, 68 *N. Y.*, 528, 536; aff'g 5 *Hun*, 338.

— *secondary not rebuttable.*—He who, by refusing to produce, lets in secondary evidence, cannot contradict it by parol.

Bogart *vs.* Brown, 5 *Pick.*, 18.

Where, in an action between partners, the defendants, having the books, refused on notice to produce them and put plaintiff to secondary proof,—*Held*, that on rebuttal defendants could not contradict that proof, and the judgment was affirmed by the Court of Appeals after argument on this point.

Mem. in Platt *vs.* Platt, 58 *N. Y.*, 646, 649.

— *destruction.*—The general rule that a party is precluded from proving the contents of a writing by the fact that he destroyed it voluntarily [1] does not apply if it was destroyed by mistake,[2] or, according to his custom, without fraudulent intent, and before any difference had arisen respecting it.[3]

[1] Blade *vs.* Nolan, 12 *Wend.*, 173.
Renner *vs.* Bank of Columbia, 9 *Wheat.*, 581.
Broadwell *vs.* Stiles, 3 *Halst.* (*N. J.*), 58.

[2] Riggs *vs.* Tayloe, 9 *Wheat.*, 483.

[3] Steele *vs.* Lord, 70 *N. Y.*, 80; s. c., 26 *Am. R.*, 602.

Bill of particulars,— as limiting evidence.—A bill of particulars, even though voluntarily served,[1] has the effect to restrict the proof to the matters set forth in it.[2]

[1]Payne *vs.* Smith, 19 *Wend.*, 122.

[2]Bowman *vs.* Earle, 3 *Duer*, 691.

An order to exclude proof for failure to serve a sufficient bill of particulars must be obtained before trial to make exclusion a matter of right.

Whitehall & Plattsburgh R. R. Co. *vs.* Myers, 16 *Abb. Pr., N. S.*, 34.

S. P., Chesapeake & Ohio Canal Co. *vs.* Knapp, 9 *Pet.*, 541, 564.

Without an order to exclude proof the judge may in his discretion exclude proof for non-compliance with an order for a bill of particulars.

Bank of U. S. *vs.* Lyman, 20 *Vt.*, 666; S. C., 1 *Blatchf.*, 297.

— *amending.*—Bill of particulars, amendable like a pleading.

Babcock *vs.* Thompson, 3 *Pick.*, 446.

Melvin *vs.* Wood, 4 *Abb. Pr., N. S.*, 438.

Books of science.—Statements made in books of inductive science, such as standard medical works, are not competent evidence for any purpose.

California. Gallagher *vs.* Market St. R. R. Co. (*Cal.*, 1885), 6 *Pac. C. R.*, 869.

Illinois. North Chicago Rolling Mill *vs.* Monka, 107 *Ill.*, 340 (book on mechanics).

Indiana. S. P., Cory *vs.* Silcox, 6 *Ind.*, 39 (sanctioning use as argument only).

[*Iowa.* Brodhead *vs.* Wiltse, 35 *Iowa*, 429 (special statute which may admit them).]

[*Kentucky.* Said to have been the practice in some lower courts to receive them. 2 *Ky. L. R. & J.*, 64.]

Maine. Ware *vs.* Ware, 8 *Greenl.*, 42.

Maryland. Davis *vs.* State, 38 *Md.*, 15.

Massachusetts. Ashworth *vs.* Kittridge, 12 *Cush.*, 93 (leading case).

Michigan. Pinney *vs.* Cahill, 48 *Mich.*, 584; S. C., with note, 22 *Am. L. Reg.*, 104.

People *vs.* Hall, 47 *Mich.*, 636; S. C., 12 *Northw. Rep.*, 665, 669.

New York. Harris *vs.* Panama R. R. Co., 3 *Bosw.*, 7, 18.

North Carolina. Huffman *vs.* Click, 77 *N. C.*, 55.

Texas. Fowler *vs.* Lewis, 25 *Tex. Supp.*, 380; cited in 1 *Meyer's Dig.*, 374. (The Texas case often cited to the contrary, Wade *vs.* De Witt, 20 *Tex.*, 398, seems to rest on the fact reasonably inferable from the report, that counsel sought to use the extract as argument merely, not as stating facts.)

Wisconsin. Stilling *vs.* Town of Thorp, 54 *Wisc.*, 528; s. c., 41 *Am. R.*, 60.

Boyle *vs.* State, 57 *Wisc.*, 472; s. c., 46 *Am. R.*, 41; 15 *Northw. Rep.*, 827; 17 *Cent. L. J.*, 91.

[*Contra,* State *vs.* Hoyt, 46 *Conn.*, 333; s. c., 38 *Am. R.*, 580, *note* (but this case can best be sustained as exceptional, and turning on surprise in excluding what had been before permitted).]

The reason is, "they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination" (Shaw, Ch. J.).

Ashworth *vs.* Kittridge, 66 *Mass.* (12 *Cush.*), 193.

— — Almanac admissible to show time of rising of moon.

Munshower *vs.* State, 55 *Md.*, 11; s. c., with note, 1 *Cr. L. Mag.*, 320.

State *vs.* Morris, 47 *Conn.*, 179 (justifying it rather as refreshing memory in aid of judicial notice).

A medical expert cannot be allowed to read and thereupon to testify what is in the book, [1] nor can the book be read from to the jury, although the witness testify that he concurs in the views expressed; [2] but a book which he has cited to sustain his views may be used to discredit him. [3]

[1] Marshall *vs.* Brown, 50 *Mich.*, 148; s. c., 15 *Northw. Rep.*, 55.

[2] Commonwealth *vs.* Sturtivant, 117 *Mass.*, 123; s. c., 19 *Am. R.*, 401.

[3] City of Ripon *vs.* Bittel, 30 *Wisc.*, 614.

Mr. Moak's art. in 24 *Alb. L. J.*, 268.

Huffman *vs.* Click, 77 *Nor. Car.*, 55, and cas. cit.

Otherwise of a book he has not cited.

Knoll *vs.* State, 55 *Wisc.*, 249; cited in 59 *Am. Dec.*, 183.

It is not error to refuse to allow a medical witness under cross-examination to be interrogated as to what is in a medical work and then require him to find what he says is there; for medical books are not admissible in evidence, either for the purpose of sustaining or contradicting a witness.

Davis *vs.* State, 38 *Md.*, 15, 37.

According to Conn. Mut. Ins. Co. *vs.* Ellis, 89 *Ill.*, 516 (and see 107 *Ill.*, 340), the rule against reading to the jury is not violated by reading to an expert under cross-examination to test his knowledge by asking him if he agrees.

— *exact science.*—Books of exact science or matnematical calculations,—such as the Northampton tables and the like,—recognized by the Court as such, or shown to be such by the testimony of a qualified witness, may be read in evidence.

Abb. Tr. Ev., 724.
22 *Am. L. Reg.*, 105 n.
59 *Am. Dec.*, 185 n.
S. P., Huffman *vs.* Click, 77 *N. C.*, 55, 58.

The contrary held of a book on mechanics, in North Chicago Rolling Mill *vs.* Monka, 107 *Ill.*, 340.

— *of history, etc.*—A book published in this country by a private person is not competent evidence against a stranger to it, of facts stated therein of recent occurrence, and which might be proved by living witnesses or other better evidence.

Whiton *vs.* Albany, etc., Ins. Co., 109 *Mass.*, 24, 31.
Morris *vs.* Harmer, 7 *Pet.*, 554.
Fuller *vs.* Princeton, 2 *Dane's Abr.*, 334.

Otherwise by special statute.
See Gallagher *vs.* Market St. R. R. Co. (*Cal.*, 1885), 6 *Pac. Rep.*, 869.
Kuhns *vs.* Chicago, etc., R. R. Co. (*Iowa*, 1885), 22 *Northw. Rep.*, 661.

Burden of proof.—The test as to "the burden of proof," as to any point, when the phrase is used respecting the order of proof in adducing evidence, is,—which party would be unsuccessful if no evidence at all, or no more than has already been received, were to be offered?

1 *Phil. Ev.*, 812.
1 *Tayl. Ev.*, 369, § 338. This subject is well discussed in Abrath *vs.* Northeastern Rw. Co. (*Eng. Ct. of App.*, June, 1883), 32 *Weekly Rep.*, 56. It is not usually safe to ask the Court, under the same circumstances, to instruct the jury that the burden has shifted. See "XVII. *The Judge's Instructions*" (*below*).
See also Lamb *vs.* Camden & Amboy R. R. & T. Co., 46 *N. Y.*, 271, 281; rev'g 2 *Daly*, 454.
Heineman *vs.* Heard, 62 *N. Y.*, 448.
Banker *vs* Banker, 63 *id.*, 409.

— *as to negative.*—In general, whichever party asserts a right must substantiate it; and if the right is dependent upon the existence of a negative, must establish the truth of the negative by a preponderance of proof, unless excused by the fact that the matter is peculiarly within the knowledge of the adverse party.[1] But a party is not required to prove the negative of any matter where the existence of the contrary affirmative is necessary to exempt or discharge the adversary from a duty or liability already proved upon him.[2] He who makes a negative allegation involving a charge of illegality, against which there is a presumption of innocence, must prove the negative.[3]

[1] 1 *Whart. Ev.*, § 357.
1 *Greenl. Ev.*, § 78.
1 *Tayl. Ev.*, 379, § 347.
Goodwin *vs.* Smith, 72 *Ind.*, 113; s. c., 37 *Am. R.*, 141, with note (same note in 25 *Alb. L. J.*, 124) where the application of the rule to a great variety of cases is illustrated.

There are two classes of negatives, definite or specific, and indefinite or universal. An averment that the contract was not performed on a day specified is a definite negative, and it is not objectionable to require proof of a definite negative. An averment that the contract was never performed is indefinite or universal, and it is only of negatives of this class that it is unreasonable to require proof.

[2] 1 *Stark. Ev.*, 589.
Elkin *vs.* Jansen, 13 *Mees. & W.*, 655, 662; s. c., 14 *L. J. Exch.*, 201; 9 *Jur.*, 353.
Commonwealth *vs.* Thurlow, 24 *Pick.*, 374, 381.

"The amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into."
Steph. Dig. Ev., art. 96.
U. S. *vs.* Southern Col. Coal, etc., Co., 1 *West Coast Rep.*, 11.

[3] People *ex rel.* Smith *vs.* Pease, 27 *N. Y.*, 45; s. c., 25 *How. Pr.*, 495; aff'g 30 *Barb.*, 588.

— *as to fact peculiarly within knowledge of one party.*—Where the subject matter of an allegation is such as to lie pecu-

liarly within the knowledge of the adversary, the burden is on him to give evidence respecting it.

Tayl. Ev., § 347.
1 *Whart.*, § 367.
Rugley *vs.* Gill, 15 *La. Ann.*, 509, and see Bowman *vs.* McElroy, *id.*, 663.
Corwin *vs.* Shoup, 76 *Ill.*, 246.
Haley *vs.* Lacey, 1 *Snow.*, 498.
Burton *vs.* Blow, 23 *Vt.*, 152.

In 43 *Barb.*, 229, JOHNSON, J., states the rule thus: "If the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party." [Citing 1 *Greenl. Ev.*, § 79; 1 *Stark. Ev.*, 362–365; *Wills on Circumstantial Ev.*, 183, 184.] This applies, he says, in all civil cases. But if understood to justify instructing the jury as to the burden of proof, this statement of the rule is too broad. (See reversal in 46 *N. Y.*, 271, 281, of the decision in Lamb *vs.* Camden & Amboy R. R. & T. Co., 2 *Daly*, 454, where, at page 463, Judge Johnson's opinion was quoted and erroneously applied to sustain instructions to the jury.

A legal presumption shifts the burden.—A presumption of law, arising from evidence already given, or from the pleadings, is sufficient to cast the burden of proof on the other party, to show (if the presumption be disputable), that the fact was otherwise than according to the presumption.

But it will not do to ask the Court to instruct the jury that the burden of proof is shifted, unless the presumption is one of law and the instruction is qualified by the condition that the evidence is believed by the jury. For when the burden of proof is said to shift, all that is meant is that the party from whom it is shifted has a right to go to the jury that they may say whether he has fulfilled his obligation to prove his case, unless the other party takes up the burden of adducing evidence and gives proofs.

Corporate agent's declarations.—The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation.

Abb. Tr. Ev., 44.
Xenia Bank *vs.* Stewart, 114 *U. S.*, 224, 229.

— *business.*—The Court may take judicial notice of the ordinary course and usages of business of corporations.

Isaacson *vs.* N. Y. Central, etc., R. R. Co., 94 *N. Y.*, 278; rev'g 25 *Hun*, 350 (carriers' usage as to checking through baggage).

Slater *vs.* Jewett, 85 *N. Y.*, 61; s. c., 39 *Am. R.*, 627 (supervising trains by telegraph).

Eaton Cole & B. Co. *vs.* Avery, 83 *N. Y.*, 31; s. c., 38 *Am. R.*, 389; aff'g 18 *Hun*, 44.

Merchants' Nat'l Bank of Whitehall *vs.* Hall, 83 *N. Y.*, 383; s. c., 38 *Am. R.*, 434; aff'g 18 *Hun*, 176 (practice of banks).

Macullar *vs.* McKinley, 49 *Super. Ct.* (*J. & S.*), 5 (business and functions of mercantile agencies).

— *deed.*—Where the common seal of a corporation appears to be affixed to an instrument, and the signature of the proper officer is proved, there is a legal presumption that the officer did not exceed his authority, and the contrary must be proved by the objecting party.

Trustees of Canandarque Acad. *vs.* McKechnie, 90 *N. Y.*, 618.

s. p., Belden *vs.* Meeker, 47 *id.*, 307.

Date.—The date of a document is *prima facie* evidence of the time when it was written.

Livingston *vs.* Arnoux, 56 *N. Y.*, 507, 519; aff'g 15 *Abb. Pr., N. S.*, 158.

The date of a private instrument unauthenticated is not alone presumptive evidence of the time the document was written, as against a stranger to it, when its competency depends on the time it was written.

Foster *vs.* Beals, 21 *N. Y.*, 247, 250.

Deposition—right to read.—An objection to the reading of a deposition on the ground of an irregularity or defect which might have been obviated by retaking it, cannot be raised at the trial, unless noted when the deposition is taken, or presented by a motion to suppress before the trial is begun.

Doan *vs.* Glenn, 21 *Wall.*, 33, and cas. cit.

Hebbard *vs.* Haughian, 70 *N. Y.*, 54.

Fassin *vs.* Hubbard, 55 *N. Y.*, 465.

Wright *vs.* Cabott, 89 *N. Y.*, 570.

So also of the refusal of a witness to answer proper questions.

Sturm *vs.* Atlantic Mut. Ins. Co., 63 *N. Y.*, 77.

As to document annexed to deposition, see 9 *Abb. N. C.*, 65 *note.*

A deposition taken conditionally within the State cannot be read if the personal attendance of the witness can be secured; one taken without the State can be read notwithstanding the presence of the witness, unless it has been suppressed by order on special motion.

Hedges *vs.* Williams, 33 *Hun*, 546.

To show inability to have witness present, the fact of letters having been received from him from places without the State shortly before the trial is competent.[1] So are his declarations, in response to inquiry for the purpose, that he is too unwell to attend.[2]

[1] Carman *vs.* Kelly, 5 *Hun*, 283.

[2] McArthur *vs.* Soule, *Id.*, 63.

— *reading part.*—He who causes a deposition to be taken, even though it be his own testimony, may read part; but whatever he omits that is relevant and competent, may be read by the adverse party.

Gellatly *vs.* Lowery, 6 *Bosw.*, 113.

[*Contra*, Southwark Ins. Co. *vs.* Knight, 6 *Whart.*, 327.]

So it was held in Railw. Assur. Co. *vs.* Warner, 1 *Supm. Ct.* (*T. & C.*), *adden.* 21, that an adverse party who calls out, by a cross-interrogatory, material evidence, is entitled to have it read so far as responsive.

Document.—Neither proving the signature of an instrument, nor marking it for identification, entitles the adverse party to see it, nor to cross-examine on it. It is the offer in evidence which has this effect.

Stiles *vs.* Allen, 5 *Allen* (*Mass.*), 320.

If the party proving its execution refuses to show it and allow cross-examination of the witness as to execution, its admission against objection is error.

Union Mfg. Co. *vs.* Byington, 1 *Hun*, 44; s. c., 3 *Supm. Ct.* (*T. & C.*), 86.

— *referred to.*—A document having been properly received in evidence, another distinctly referred to and recognized in it may be received without further proof of execution.

Clark *vs.* Mix, 15 *Conn.*, 152.

An oral contract having been proved, an instrument referred to in it as containing some of its terms may be received without further proof of its execution.

Smith *vs.* N. Y. Central, etc., R. R. Co., 4 *Abb. Ct. App. Dec.*, 262.

— *producing on notice.*—If a party produces a document on notice and offers to prove its genuineness, it is error to allow the party who gave the notice to give secondary evidence of contents of the document called for until the one offered has been received in evidence and submitted to the jury.

Stitt *vs.* Huidekopers, 17 *Wall.*, 384, 397.

— *refusal to produce.*—In the Courts of the United States, if a party refuses to produce a document at the trial, pursuant to order made on motion before trial, he may be nonsuited, if plaintiff; and a verdict against him may be directed, if defendant.

U. S. R. S., § 724.

As to the power in the State Courts.

See 82 *N. Y.*, 260, and cas. cit.

— *inspecting on notice to produce.*—If a party obtains and inspects a paper by means of notice to produce, has the one who produced it a right to put it in evidence, if relevant?

Affirmative:

Clark *vs.* Fletcher, 1 *Allen*, 53, 57 (Bigelow, Ch. J.).
Lawrence *vs.* Van Horne, 1 *Cai.*, 276, 285 (*dictum*).
Waller *vs.* Stewart, 4 *Cranch. C. Ct.*, 532.
Wharam *vs.* Routledge, 5 *Esp.*, 210.
Wilson *vs.* Bowie, 1 *C. & P.*, 10.
Steph. Dig. Ev., art. 138.

The reason assigned for this view is the same which prevents a party who puts a question from excluding from the record a responsive answer, because it is not what he wants,—that otherwise a party could gain the advantage, if any, from his inquiry, without any corresponding obligation.

Negative:

Kenney *vs.* Clarkson, 1 *Johns.*, 385, 394 (*dictum*).
Stalker *vs.* Gaunt, 12 *N. Y. Leg. Obs.*, 124 (*dictum*).
Sayer *vs.* Kitchen, 1 *Esp.*, 210.
Carr *vs.* Gale, 3 *Woodb. & M.*, 38.

The negative is followed in practice in the N. Y. Courts.

The reason assigned in the reports for the negative view is, that notice to produce is analogous to a bill of discovery where the answer is not evidence for him who makes it, and that to hold the document admissible would tend to drive parties into equity for discovery.

A better justification for it is, that production on notice is not obligatory, and inspection by counsel is not a matter of evidence at all, but a mere preliminary.

A party obtaining an instrument from his adversary by notice to produce, and examining it, cannot examine a witness on it if he will not offer it in evidence.

Hotchkiss *vs.* Germania Ins. Co., 5 *Hun*, 91.

Entire conversation or writing.—The introduction of a part of a conversation[1] or writing[2] renders admissible as much of the remainder as tends to explain or qualify what has been received; and that is to be deemed a qualification which rebuts and destroys the inference to be derived from, or the use to be made of, the portion put in evidence.

[1] Rouse *vs.* Whited, 25 *N. Y.*, 170.
Gildersleeve *vs.* Landon, 73 *N. Y.*, 609.

[2] Gratton *vs.* Metropolitan Life Ins. Co., 92 *N. Y.*, 274, 284.
Whether under this rule, proving an interview or communication may let in a subsequent one, if thus connected,—compare (in affirmative), Nesbit *vs.* Stringer, 2 *Duer*, 26; (negative), Downs *vs.* N. Y. Central, etc., R. R. Co., 47 *N. Y.*, 83.

Examination before trial—One who has examined his adversary before trial and read the examination at the trial, is not entitled to examine him further as a witness on the same subject, unless excuse or reason therefor is given.

Wilmont *vs.* Meserole, 40 *Super. Ct.* (*J. & S.*), 321.

It is within the discretion of the judge to permit further oral examination at the trial.

Misland *vs.* Boynton, 14 *Hun*, 625; aff'd in 79 *N. Y.*, 630.

If he has not read the examination at the trial he has a right to call him as a witness.

Berdell *vs.* Berdell, 27 *Hun*, 34; s. c., 63 *How. Pr.*, 339.

One who has examined his adversary before trial may read a part of his examination as evidence, but cannot be required to read the whole.

Brooks *vs.* Baker (per VAN HOESEN, J.), 9 *Daly*, 398, 402; following Gellatly *vs.* Lowery, 6 *Bosw.*, 113.

When one has read, at the trial, part of his adversary's previous examination, his adversary is not entitled to put the whole examination in evidence, but only the answers which pertain to the same subject, or rather which tend to qualify what has been read.

Lynde *vs.* McGregor, 13 *Allen* (*Mass.*), 172.

Explaining omission of evidence.—When a party whose good faith in refraining from testifying in his own behalf [1] or calling

as a witness a person shown to be acquainted with the facts, is questioned, he has a right to give evidence explaining his course.

[1]Woodruff *vs.* Hurson, 32 *Barb.*, 557.

So in reference to a Chinese certificate. Green, Ch. J., said: "Non-production of a certificate is a circumstance which, if alone and unexplained, may properly be regarded as proof that the person lacking it is one who is prohibited. But its non-production is open to explanation, and the presumption arising from its non-production to contradiction."

Matter of Lee Yip, cited and followed in *In re* Ho King, 14 *Fed. Rep.*, 724.

Fact after suit brought.—Under the general issue or any plea which puts the amount of recovery in dispute, a receipt given after the suit was brought may be given in evidence to reduce the amount of recovery.

Burdell *vs.* Denig, 92 *U. S.* (2 *Otto*), 716.

Feelings.—Wherever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings are original and competent evidence.

Travellers' Ins. Co. of Chicago *vs.* Mosley, 8 *Wall.*, 397.

Matteson *vs.* N. Y. Central, etc., R. R. Co., 35 *N. Y.*, 487.

Abb. Tr. Ev., 599.

Fraud.—Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties at or near the same time, is admissible.

Lincoln *vs.* Claflin, 7 *Wall.*, 132, 139.

Olmsted *vs.* Hotailing, 1 *Hill*, 317.

Handwriting.—A person who has seen another write his name but once can testify to his handwriting, and he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all.

Rogers *vs.* Ritter, 12 *Wall.*, 317.

See *Abb. Tr. Ev.*, 393.

Illegality.—Not available as a defense unless pleaded.

13 *Abb. N. C.*, 388.

Impeaching, etc.—A party cannot impeach his own witness, in the sense of proving him unworthy of credit;[1] but he may show that he was mistaken, and for this purpose may call other witnesses[2] or examine him as to previous statements for the purpose of reconciling or correcting his tatements, even though the effect may be unfavorable to his credibility.[3]

[1]Neither by general evidence, nor by proving by other witnesses prior contradictory statements.
Cox *vs.* Eayres, 55 *Vt.*, 24; s. c., 45 *Am. R.*, 583, and cas. cit.
[2]Swamscot Machine Co. *vs.* Walker, 22 *N. H.*, 457; s. c., 55 *Am. Dec.*, 172, with note.
[3]Bullard *vs.* Pearsall, 53 *N. Y*, 230.
14 *Abb. N. C.*, 471, *note.*

If a party is allowed to extend his cross-examination of an adversary's witness beyond the limits of a strict cross-examination the witness becomes *in so far* his own,[1] and he cannot impeach him generally, nor in respect thereto;[2] nor can he put leading questions,[3] unless the judge in his discretion allows them.

[1]People *ex rel.* Phelps *vs.* Oyer & T. of N. Y., 83 *N. Y.*, 436, 459, and cas. cit.; aff'g 19 *Hun*, 91.
Jackson *vs.* Thomas, 2 *Cai.*, 178.
[2]People *vs.* Moore, 15 *Wend.*, 422.
[3]People *ex rel.* Phelps *vs.* Oyer & T. of N. Y. (*above*).
[*Contra*, Moody *vs.* Rowell, 17 *Pick.*, 490, 499. (Opinion by SHAW, Ch. J.).]

Statements of opinion adverse to the testimony may be proved as well as statements of fact.
Schell *vs.* Plumb, 55 *N. Y.*, 592; aff'g 16 *Abb. Pr.*, 19.

The time to read an inconsistent writing in evidence is not on the cross-examination, when the witness' attention is called to it, but when the cross-examining party comes to offer his own evidence.
Romertze *vs.* East River Nat. Bk., 49 *N. Y.*, 577; rev'g 2 *Sweeny*, 82.

Former testimony of a witness, read under a stipulation allowing it, cannot be impeached by proving inconsistent statements to which his attention has not been called.
Hubbard *vs.* Briggs, 31 *N. Y.*, 518, 536.

— *by disparaging questions.*—On cross-examination a witness may be required to answer any questions relating to specific facts which tend to discredit him or to impeach his moral character, even though not relevant to the issue.[1]

But the judge may, in his discretion, exclude such inquiries if not relevant to the issue, and may do so on the objection of the party, without putting the witness to his election.[2]

[1]People *ex rel.* Phelps *vs.* Oyer and T. of N. Y., 83 *N. Y.*, 436, 460.
[2]Great Western Turnpk. Co. *vs.* Loomis, 32 *N. Y.*, 127, 138.

Impression.—Witness may testify to an impression if it be memory, not if it be mere belief or inference.

3 *Abb. N. C.*, 235.

Intent.—A party may testify in his own behalf to his own intent in doing an act[1] or in the use of ambiguous language,[2] where the intent is a question of fact in issue,[3] and not a conclusion of law necessarily inferred from the fact.[4]

[1]Fish *vs.* Inhabitants of Chester, 74 *Mass.* (8 *Gray*), 506 (intent as to residence or domicile).

Hulett *vs.* Hulett, 37 *Vt.*, 581, 586 (*the same*).

Danforth *vs.* Carter, 4 *Iowa*, 230 (intent to give credit to defendant).

Sweet *vs.* Tuttle, 14 *N. Y.*, 465.

Abb. Tr. Ev., 265 (intent of payment).

Yerkes *vs.* Salomon, 11 *Hun*, 471 (wager contract).

Cortland Co. *vs.* Herkimer Co., 44 *N. Y.*, 22 (good faith of an official act).

People *vs.* Baker, 96 *N. Y.*, 340 (false pretences).

[2]Mickey *vs.* Burlington Ins. Co., 35 *Iowa*, 174 (meaning of an affidavit).

1 *Greenl. Ev.*, § 462, n. 1.

Not, however, where the witness was the mere draftsman, and the object is to interpret the right or obligation arising on the instrument.

Nevius *vs.* Dunlap, 33 *N. Y.*, 676.

[3]So held of the absence of intent to defraud in making an assignment.

Seymour *vs.* Wilson, 14 *N. Y.*, 567 (the leading case; judgment reversed for excluding the question).

Starin *vs.* Kelly, 88 *N. Y.*, 318, and cas. cit.

McKown *vs.* Hunter, 30 *N. Y.*, 625 (good faith in prosecution).

[4]Fiedler *vs.* Darrin, 50 *N. Y.*, 437 (usury).

Lawyer *vs.* Loomis, 3 *Supm. Ct.* (*T. & C.*), 393 (malice in prosecution without cause).

A party cannot testify in his own behalf to his undisclosed intent in order to alter the effect of that which was matter of contract,[1] representation[2] or estoppel on which the other party had a right to rely.

[1]Dillon *vs.* Anderson, 43 *N. Y.*, 231.

Craighead *vs.* Peterson, 72 *N. Y.*, 279; s. c., 28 *Am. R.*, 150.

[2]Ballard *vs.* Lockwood, 1 *Daly*, 158.

Waugh *vs.* Fielding, 48 *N. Y.*, 681 (deceit).

Where it is necessary to prove concurrence of intent,—as in an illegal agreement,—the intent of each person may be proved by independent evidence; and evidence which shows the intent of

one person is not incompetent, merely because it is no evidence of the intent of the other, provided appropriate evidence of the intent of the other be given in due course.

Abb. Tr. Ev., 739, *note* 5.

Yerkes *vs.* Saloman, 11 *Hun*, 471.

Intent of a transaction.—The purpose or policy of an act may be stated by a witness who was present and cognizant of the whole transaction,—as whether the delivery of money by one man to another was by way of payment or otherwise.

Nat. Bank of the Metropolis *vs.* Kennedy, 17 *Wall.*, 19, 29.

Interrogating to discover other witnesses.—Counsel has not an absolute right to interrogate his own witness merely for the sake of ascertaining the name of a person whom he may wish to call as a witness, when the name is not relevant to the issue, but is merely sought by way of discovery to enable him to make inquiry out of court or to subpœna a person as a witness. But in strict cross-examination, where great latitude is allowed, without being limited to matters relevant to the issue, questions which may have this object are not improper if not improper on other grounds.

14 *Abb. N. C.*, 470, *note.*

Jurisdictional facts—inferior Court or statutory proceeding.—Recitals of the necessary jurisdictional facts in a judgment of a Court of inferior jurisdiction, or in a special statutory proceeding, are sufficient *prima facie* evidence of jurisdiction.[1]

If jurisdictional facts do not appear in such a record, extrinsic evidence is competent to supply the defect,[2] but the presumption that public officers have discharged their duty[3] does not supply the defect.[4]

[1] Agricultural Ins. Co. *vs.* Bernard, 14 *Abb. N. C.*, 502; s. c., 96 *N. Y.*, 526; rev'g 26 *Hun*, 602.

Wright *vs.* Nostrand, 94 *N. Y.*, 31; rev'g 47 *Super. Ct.* (*J. & S.*), 441.

[2] Van Deusen *vs.* Sweet, 51 *N. Y.*, 378.

[3] See, in support of this presumption, Mandeville *vs.* Reynolds, 68 *N. Y.*, 528; aff'g 5 *Hun*, 338.

Miller *vs.* Brown, 56 *N. Y.*, 383.

[4] Galpin *vs.* Page, 18 *Wall.*, 350.

Settlemeier *vs.* Sullivan, 97 *U. S.* (7 *Otto*), 447.

— court of general jurisdiction.—In support of the judgment of a superior Court of general jurisdiction, proceeding according to the due course of common law, the jurisdictional facts are presumed, in respect to parties within the territorial limits of the jurisdiction, if the record is silent. But if the record states an insufficient fact it is not aided by presumption.

Dayton *vs.* Johnson, 69 *N. Y.*, 419.

And this presumption applies as against infants as well as others.

Bosworth *vs.* Vandewalker, 53 *N. Y.*, 597.

Law of other jurisdictions.—The rule that foreign law must be averred and proved as matter of fact applies to the laws of sister States, when involved in a cause in a State Court;[1] and in the absence of averment or proof, the presumption is that in a State or nation where the common law prevails the common law rules are the same as those of the forum,[2] but not that the statutes are.[3]

[1]See People *ex rel.* Lawrence *vs.* Brady, 56 *N. Y.*, 182.

[2]Savage *vs.* O'Neil, 44 *N. Y.*, 298.

People *ex rel.* Lawrence *vs.* Brady (*above*).

First Nat'l B'k of Meadville *vs.* Fourth Nat'l B'k of N. Y., 77 *N. Y.*, 320; rev'g 16 *Hun*, 332.

And see Waldron *vs.* Ritchings, 7 *Abb. Pr., N. S.*, 359; s. c., 3 *Daly*, 288; see also 19 *Cent. L. J.*, 242.

[3]Graves *vs.* Cameron, 9 *Daly*, 152.

Leonard *vs.* Columbia Steamboat Co., 84 *N. Y.*, 48; s. c., 38 *Am. R.*, 491.

The common law is not presumed to exist in another State except in the absence of statutory provisions on the subject.

Moore *vs.* Hegeman, 92 *N. Y.*, 521; aff'g 27 *Hun*, 68.

Hynes *vs.* McDermott, 82 *N. Y.*, 41; s. c., 37 *Am. R.*, 538.

As to mode of proof of foreign law, see

Abb. Tr. Ev., 22, 23.

Ennis *vs.* Smith, 14 *How.* (*U. S.*), 400; s. c., with note, in 55 *U. S. Supm. Ct. R.* (*Law ed.*), 473.

The United States Courts are bound to take judicial notice of the jurisprudence and public laws of the several States,[1] and of those formerly prevailing in acquired States or Territories.[2]

[1]Owings *vs.* Hull, 9 *Pet.*, 607, 625 (notarial acts).

Covington Drawbridge Co. *vs.* Shepherd, 20 *How.* (*U. S.*), 227 (public statutes).

[2]U. S. *vs.* Perrot, 98 *U. S.* (8 *Otto*), 428.

They *may* take judicial notice even of a private act if the State Court could.

Junction R. R. Co. *vs.* Bank of Ashland, 12 *Wall.*, 226.

Leading questions allowable to one's own witness.—The judge may in his discretion, allow leading questions to be put on direct or re-direct examination, where the witness is hostile or reluctant, or is in the interest of the other party, or so youthful, ignorant or

infirm as to require the attention to be led; or where his memory has been exhausted without stating some particular, such as a name, which cannot be significantly pointed to by a general inquiry.

14 *Abb. N. C.* 470, *note.*

Moody *vs.* Rowell, 17 *Pick.*, 490, 498 (SHAW, Ch. J.).

Metrop. Bk. *vs.* Hale, 28 *Hun*, 341 (witness of adverse feeling).

Cheney *vs.* Arnold, 18 *Barb.*, 434 (witness old and blind.

S. P., Stratford *vs.* Sanford, 9 *Conn.*, 274, 284.

And see Snyder *vs.* Snyder, 50 *Ind.*, 492.

— *sometimes excluded on cross.*—The judge may, in his discretion, refuse to allow leading questions to be put on cross-examination, to a witness who shows a strong interest or bias in favor of the cross-examining party.

Moody *vs.* Rowell, 17 *Pick.*, 490, 498.

Letters.—A party may put in evidence a letter containing admissions material to the case without putting in the whole correspondence.

Barrymore *vs.* Taylor, 1 *Esp.*, 326.

Stone *vs.* Sanborn, 104 *Mass.*, 319.

[*Contra*, Simmons *vs.* Haas, 56 *Md.*, 153; s. c., 11 *Rep.*, 840.]

When a document is properly in evidence, the envelope in which it was delivered, and any other paper which accompanied and was delivered in the envelope, is competent as part of the *res gestæ*, not as proof of statements in it, but to show under what cover its contents reached the party.

U. S. *vs.* Noelke, 9 *Rep.*, 505.

Darling *vs.* Miller, 54 *Barb.*, 149.

Letters of an agent through whom business was transacted may be received as part of the *res gestæ.*

Beaver *vs.* Taylor, 1 *Wall.*, 637.

Rosenstock *vs.* Tormey, 32 *Md.*, 169; s. c., 3 *Am. R.*, 125.

Letterbook.—A press copy of a letter is not primary evidence against the writer.

Marsh *vs.* Hand, 35 *Md.*, 123.

King *vs.* Worthington, 73 *Ill.*, 161.

Watkins *vs.* Paine, 57 *Geo.*, 50.

Loss of earnings or income.—Annual earnings from professional or other personal services may be proved as a basis for

damages in an action for personal injury ;[1] but not annual income which includes that arising from capital invested in business and the co-operation of a partner.[2]

[1]Ehrgott *vs.* Mayor, etc., of N. Y., 96 *N. Y.*, 264 ; rev'g 66 *How. Pr.*, 61.

Wade *vs.* Leroy, 20 *How.* (*U. S.*), 34, 43.

Nebraska City *vs.* Campbell, 2 *Black*, 590.

And see Bierbach *vs.* Goodyear Rubber Co., 54 *Wisc.*, 208 ; s. c., 41 *Am. R.*, 19.

[2]Masterton *vs.* Village of Mt. Vernon, 58 *N. Y.*, 391.

Mailing.—Evidence that a postpaid notice of protest was duly mailed, by deposit either in the post-office, a government letter box,[1] or the hand of the official letter-carrier on his round,[2] and addressed to another town, is conclusive evidence of its receipt.

[1]Wynen *vs.* Schappert, 6 *Daly*, 558.

[2]Pearce *vs.* Langfitt, 101 *Penn. St.*, 507 ; abstr. s. c., 28 *Alb. L. J.*, 417.

So also evidence that it was put in due course for mailing is competent.

Abb. Tr. Ev., 434.

Evidence that a letter other than notice of protest was so duly mailed ; or that it was deposited where in due course of business it should have been mailed, or received, with evidence of such course of business, is competent to go to the jury, and will sustain a finding of actual receipt, but does not raise a legal presumption thereof.

Rosenthal *vs.* Walker, 111 *U. S.*, 185, 193 (holding this presumption sufficient to let in letter-press copies).

Austin *vs.* Holland, 69 *N. Y.*, 571 ; s. c., 25 *Am. R.*, 246, with note.

Howard *vs.* Daly, 61 *N. Y.*, 362 ; s. c., 19 *Am. R.*, 285 (deposit in private letter box).

U. S. *vs.* Babcock, 3 *Dill.*, 566, 571.

Sullivan *vs.* Kuykendall (*Ky.*, 1885), 13 *Wash. L. Rep.*, 164.

Abb. Tr. Ev., 291.

Memorandum.—Papers, not evidence *per se*, but proved to have been true statements of fact at the time they were made, are admissible in connection with the testimony of a witness who made them.

Ins. Cos. *vs.* Weides, 14 *Wall.*, 375, and cas. cit.

A memorandum shown to be correct, taken from lost papers, is evidence of their contents.

Ætna Ins. Co. *vs.* Weide, 9 *Wall.*, 677.

— *used to refresh.*—Anything used to refresh witness' memory adverse counsel may see and cross examine on, but is not bound to put in evidence.

Abb. Tr. Ev., 321.

For the cases in which memoranda can be so used
See *id.* and Maxwell *vs.* Wilkinson, 113 *U. S.*, 658.
Howard *vs.* McDonough, 77 *N. Y.*, 592.

Memory of one witness aided by another.—Amount allowed to be proved by testimony of a witness that he once knew it and told it correctly to plaintiff, and testimony of plaintiff to what amount the witness told him.

Shear *vs.* Van Dyke, 10 *Hun*, 528.

Minutes.—The minutes of a judge or referee on a former trial cannot be read as evidence of what was there testified, if he be living but testifies that he cannot say they contain the testimony accurately, but may have omitted some things.

Huff *vs.* Bennett, 6 *N. Y.*, 337; aff'g 4 *Sandf.*, 120.

Motive.—When the motive of a party or witness in performing a particular act or in making a particular declaration becomes material in a cause, he may himself testify in regard to it.

Tracy *vs.* McManus, 58 *N. Y.*, 257.
Kerrains *vs.* People, 60 *N. Y.*, 221; s. c., 19 *Am. R.*, 159.
And see *Intent* (*above*).

Notary's seal.—The Court will take judicial notice of the seals of notaries public.

Pierce *vs.* Indseth, 106 *U. S.* (16 *Otto*), 546.

Official act.—The presumption is that no official person, acting under oath of office, will do aught against his official duty, or will omit to do aught which his official duty requires to be done.

Mandeville *vs.* Reynolds, 68 *N. Y.*, 528; aff'g 5 *Hun*, 338.

This presumption does not supply proof of a substantive fact.

U. S. *vs.* Ross, 92 *U. S.* (2 *Otto*), 281.

Oral to vary.—For the numerous exceptions to the rule excluding oral evidence offered to vary or explain a writing, see

Abb. Tr. Ev., 295.
3 *Abb. N. C.*, 372, note (statutes).
Juillard *vs.* Chaffee, 92 *N. Y.*, 592 (negotiable paper).
Baldwin *vs.* Bank of Newburg, 1 *Wall.*, 234.
Davis *vs.* Brown, 94 *U. S.* (4 *Otto*), 423.
White *vs.* National Bank, 102 *U. S.* (12 *Otto*), 658.

Van Brunt *vs.* Day, 8 *Abb. N. C.*, 336; s. c., 81 *N. Y.*, 251; rev'g 17 *Hun*, 176 (collateral stipulation).
Stone *vs.* Harmon, 31 *Minn.*, 512; s. c., 19 *Northw. Rep.*, 88 (contract).
West *vs.* Smith, 101 *U. S.* (11 *Otto*), 263 (correspondence).
Rhodes *vs.* Cleveland Rolling Mill, 17 *Fed. Rep.*, 426 (meaning of expressions).
Hitz *vs.* National Met. Bk., 111 *U. S.*, 722 (true amount of consideration in deed).
Railroad Co. *vs.* Durant, 95 *U. S.* (5 *Otto*), 576 (object of deed "in trust").
Claflin *vs.* Fletcher, 7 *Fed. Rep.*, 851 (real party in interest in judgment).
Nash *vs.* Towne, 5 *Wall.*, 689 (surrounding circumstances).
Mobile *vs.* Montgomery, etc., R. R. Co., 111 *U. S.*, 584, 591 (allowing evidence that writing did not express the parol agreement, and was not authoritatively delivered).

Reason for positiveness.—A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.

Blackwell *vs.* Hamilton, 47 *Ala., N. S.*, 472.
Angell *vs.* Rosenburgh, 12 *Mich.*, 241, 256.

Receipt.—Any terms in a receipt which import a binding contract or stipulation between the parties, are within the rule excluding parol evidence to vary a contract,[1] but that part which is a mere receipt is not.[2]

[1]The Lady Franklin, 8 *Wall.*, 325; s. c., with note, 75 *U. S.* (*Law. ed.*), 455 (words agreeing to account on demand for the thing receipted held not a contract within the rule; so held as between third persons).
Eaton *vs.* Alger, 2 *Abb. Ct. App. Dec.*, 5.
Compare Knoblauch *vs.* Kronschnabel, 18 *Minn.*, 300.

[2]The Lady Franklin, 8 *Wall.*, 325; s. c., with note, 75 *U. S.* (*Law. ed.*), 455.
So held of a bill of lading. *Ib.*

A mere receipt, if not sufficiently explained or contradicted, is conclusive.

Riley *vs.* Mayor, etc., of N. Y., 94 *N. Y.*, 331.

Reference to third person.—When a person refers to another for an answer on a particular subject, the answer is, in general, evidence against him.

Duval *vs.* Cowenhoven, 4 *Wend.*, 564.

This rule does not let in statements on a different subject, such as information, given to one who was sent for money[1] or for instructions,[2] not for information.

[1] Murphy *vs.* Killinger, 8 *Wall.*, 480.

[2] Duval *vs.* Cowenhoven, 4 *Wend.*, 564.

It does not let in the results of inquiries made by the third person in consequence of the reference, such as what was entered in the books in his charge.

Lambert *vs.* People, 6 *Abb. N. C.*, 181; s. c., 76 *N. Y.*, 220.

Relevancy.—Whatever testimony will assist in showing which party speaks the truth as to any of the issues, is relevant.

Platner *vs.* Platner, 78 *N. Y.*, 90.

Remote evidence.—Evidence may be rejected as too remote.

Xenia Bank *vs.* Stewart, 114 *U. S.*, 224, 231, and cas. cit.

Nicholson *vs.* Waful, 70 *N. Y.*, 604; rev'g 6 *Hun*, 655.

Res gestæ.—The rule of the *res gestæ* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.

Commonwealth *vs.* Hackett, 2 *Allen (Mass.)*, 136.

Insurance Co. *vs.* Mosley, 8 *Wall.*, 397 (a leading case, but carrying the rule to the extreme of its usual limits, and not followed to that extent in all the States).

Conversation preceding the act may be admitted.

Ahern *vs.* Goodspeed, 72 *N. Y.*, 108; aff'g 9 *Hun*, 263.

Schnicker *vs.* People, 88 *N. Y.*, 192.

So may acts and declarations of third persons strangers to the action, as for instance, fellow passengers in a railroad collision.

Twomley *vs.* Central Park, etc., R. R. Co., 69 *N. Y.*, 158; s. c., 25 *Am. R.*, 162.

Norwich Transportation Co. *vs.* Flint, 13 *Wall.*, 3.

The rule of the *res gestæ* does not admit declarations so separated from the occasion as not to gain credit from the impulse of the exigency, or as to admit the influence of intervening motives.

Abb. Tr. Ev., 588, and cas. cit.

14 *Am. L. Rev.*, 817; 15 *id.*, 71.

Waldele *vs.* N. Y. Central, etc., R. R. Co., 95 *N. Y.*, 274; s. c., 47 *Am. R.*, 41, 52 (declaration half an hour after the occurrence).

McDermott *vs.* Hannibal, etc., R. R. Co., 73 *Mo.*, 516; s. c., 39 *Am. R.*, 526.

It does not admit a narrative of a past fact.
First Nat. Bk. *vs.* Ocean Bk., 60 *N. Y.*, 278; s. c., 19 *Am. R.*, 181.

Statute of frauds.—Where several papers are relied on they must be connected physically or by reference.
Tallman *vs.* Franklin, 14 *N. Y.*, 584, 588; rev'g 3 *Duer*, 395.
Grafton *vs.* Cummings, 99 *U. S.* (9 *Otto*), 100.
Exceptions to this rule:
Beckwith *vs.* Talbot, 95 *U. S.* (5 *Otto*), 289.

Whether the law of the forum or of the place of contract applies, depends on whether the question is one of title to realty, or, if not, on whether the statute is so expressed as to go to the validity of the contract, or as only forbidding an action.
Marie *vs.* Garrison, 13 *Abb. N. C.*, 214, 299.

Stenographer's minutes.—Testimony given on a former trial of the same cause by a witness now deceased or beyond the jurisdiction[1] may be proved by the stenographer's minutes.[2]
[1]For cases on the general rule, see 3 *Abb. N. Y. Dig., new ed.*, 109.
[2]Stewart *vs.* First Nat. Bk., 43 *Mich.*, 257 (no question as to mode of authentication seems to have been made).
So of a deceased witness.

The minutes, though certified by the stenographer, are not competent without further authentication.[1]
Otherwise, where the statute makes them evidence.[2]
[1]Phares *vs.* Barber, 61 *Ill.*, 271, 276 (minor point and facts not stated).
s. p., Golden Terra Mining Co. *vs.* Smith, 2 *Dak.*, 377: s. c., 11 *Northw. Rep.*, 98.
[2]State *vs.* Frederic, 69 *Me.*, 400.
They may be admissible after his death as entries in the course of duty.
Where the stenographer who transcribed the minutes testified that his transcript was absolutely correct, but that he had not compared it,—*Held*, not error to exclude it for want of comparison.
People *vs.* McKinney, 49 *Mich.*, 334 (Cooley, J., criminal case).

The stenographer's minutes on a former trial cannot be used to impeach the testimony of a witness not a party, without first calling his attention to the matter.
Seligman *vs.* Ten Eyck Estate (*Mich.*, 1884), 18 *Northw. Rep.*, 819.

Stipulation as to facts.—A stipulation admitting the facts for the purposes of the trial, does not exclude further evidence, unless so expressed.

Dillon *vs.* Cockcroft, 90 *N. Y.*, 649.

An application to relieve against a stipulation on the ground that the allegations admitted by it were false, must be by special motion. It is not error to refuse to consider the motion at the trial.

Frisbee *vs.* Fitzsimmons, 3 *Hun*, 674.

The party should ask leave to withdraw a juror.

Dillon *vs.* Cockcroft, 90 *N. Y.*, 649.

Tampering.—It is competent to prove that the adverse party has tampered with witnesses[1] or a juror.[2]

[1]Gallerett *vs.* McKinley, 27 *Hun*, 320 (offer to bribe).

Chicago City R. R. Co. *vs.* McMahon, 103 *Ill.*, 485.

Egan *vs.* Bowker, 5 *Allen*, 449 (subornation of a deposition, competent though deposition be not used).

Brown *vs.* Byam (*Iowa*, 1884), 21 *Northw. Rep.*, 684.

Snell *vs.* Bray, 56 *Wisc.*, 156; s. c., 14 *Northw. Rep.*, 14 (letters urging testimony in specified way, or warning against aiding adversary).

People *vs.* Marion, 29 *Mich.*, 31.

Unnecessary to cross-examine the witness first.

Martin *vs.* Barnes, 7 *Wisc.*, 239.

[2]People *vs.* Marion, 29 *Mich.*, 31.

That plaintiff's agent tampered with evidence, not enough, unless shown to have been done in the course of employment.

Green *vs.* Town of Woodbury, 48 *Vt.*, 5.

Chicago City R. R. Co. *vs.* McMahon, 103 *Ill.*, 485.

A party charged with tampering has a right to testify in explanation.

Horner *vs.* Everett, 91 *N. Y.*, 641.

Donohue *vs.* People, 56 *id.*, 208.

Lynch *vs.* Coffin, 131 *Mass.*, 311 (saying the judge may in his discretion allow explanation).

Telegrams.—In general, where the course of communication is such that the message *as delivered to the telegraph company* binds either party, that paper is primary evidence as against such party. Where such, that the message *as received* binds either party, that paper is primary evidence, as against him.

Oregon Steamship Co. *vs.* Otis, 14 *Abb. N. C.*, 388, 394, with note, and cases there collected on all the various aspects of offering telegrams as evidence.

Relevant letters and telegrams which the party on testifying as a witness does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.

Ib.

Telephone.—One who knowingly communicates by telephone, through the operator at the other end interpreting what he says to his interlocutor, makes the operator his agent; and the statements so made by the operator are competent against the sender, and may be proved by any person who heard the operator's interpretations.

Sullivan *vs.* Knykendall, 13 *Wash. L. Rep.*, 164; s. c., 24 *Am. L. Reg., N. S.*, 442; disapproved in note in *id.*, 452.

Compare Shear *vs.* Van Dyke, 10 *Hun*, 528, under "*Memory*" (p. 98, *above*).

Whether the utterance of voice as heard through the telephone is alone sufficient evidence of identity;

See 28 *Alb. L. J.*, 422.

Trust.—Oral evidence is competent to establish a trust, notwithstanding the Statute of Frauds, where its exclusion would work a fraud.

Marie *vs.* Garrison, 13 *Abb. N. C.*, 334, 338, *note.*

Wood *vs.* Rabe, 96 *N. Y.*, 414.

As to tracing proceeds,—see

Knatchbull *vs.* Hallett, *L. R.*, 13 *Ch. Div.*, 696.

Hooley *vs.* Gieve, 9 *Abb. N. C.*, 41, *note.*

United States Courts.—"*The mode of proof*, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open Court, except as hereinafter provided."

U. S. R. S., § 861.

The provisions referred to as "hereinafter" relate to taking depositions, and do not sanction examinations before trial, such as allowed by recent State statutes.

Exp. Fisk, 113 *U. S.*, 713, 726.

Every action at law in a court of the United States must be governed by the rule, or by the exceptions, which *U. S. R. S.*, § 861 (*above*), provides. There is no place for exceptions made by State statutes.

Ib.

"In the Courts of the United States no *witness* shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guard-

ians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court."

U. S. R. S., § 858.

This provision (*U. S. R. S.*, § 858), wherever it differs from the State statutes, controls the United States Courts.

King *vs.* Worthington, 104 *U. S.* (14 *Otto*), 44, 51.

In other respects than as above provided the law of evidence prevailing in the State Courts controls the Courts of the United States.

U. S. R. S., § 858, last clause.

Vance *vs.* Campbell, 1 *Black*, 427; s. c., with note, 66 *U. S.* (*Law. ed.*), 168.

King *vs.* Worthington, 104 *U. S.* (14 *Otto*), 44, 50.

Conn. Life Ins. Co. *vs.* Union Trust Co., 112 *U. S.*, 250, 255.

Usage.—In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law and not unreasonable.

Walls *vs.* Bailey, 49 *N. Y.*, 464; s. c., 10 *Am. R.*, 407.

Barnard *vs.* Kellogg, 10 *Wall.*, 383.

Fuller *vs.* Robinson, 86 *N. Y.*, 306; s. c., 40 *Am. R.*, 540.

For the general rule and its exceptions, see

1 *Abb. N. C.*, 470, *note*, and *Abb. Tr. Ev.*, 296.

Usage cannot be proved to contradict a rule of law; [1] or contradict unambiguous terms in the contract; [2] or its legal effect. [3]

[1] Corn Exchange Bank *vs.* Nassau Bank, 91 *N. Y.*, 74, and cas. cit.

Barnard *vs.* Kellogg, 10 *Wall.*, 383.

[2] Farmers' & Mech. Nat. Bk. of Buffalo *vs.* Logan, 74 *N. Y.*, 568.

[3] Barnard *vs.* Kellogg, 10 *Wall.*, 383.

Usage of language may be proved to show the meaning of words otherwise unambiguous.

Myers *vs.* Sarl, 30 *L. J. Q. B.*, 9; s. c., 7 *Jur., N. S.*, 97.

If a usage of a particular trade or locality is proved, the adverse party, if not of such trade, may rebut its effect by proving his ignorance of it.

Walls *vs.* Bailey, 49 *N. Y.*, 464; s. c., 10 *Am. R.*, 407.

Johnson *vs.* De Peyster, 50 *N. Y.*, 666.

The good faith of a transaction being impugned, conformity to usage may be shown.

Dutchess Co. Mut. Ins. Co. *vs.* Hachfield, 73 *N. Y.*, 226.

Value and damage.—Where the witness is competent and states the facts, his conclusion as to the amount of pecuniary injury to property having a market value—*i. e.*, the value before and after the injury—is generally deemed admissible, although it may be identical with the question on which the jury are to find.

Abb. Tr. Ev., 598.
3 *Abb. N. Y. Dig.*, 79.
7 *id.*, 755–757.

Witness' memory.—A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.

O'Hagan *vs.* Dillon, 76 *N. Y.*, 170.

See also *Reason* and *Relevancy* (*above*).

XIV.—STOPPING THE CASE.

1. *Voluntary nonsuit — common law rule.*—At common law plaintiff has a right voluntarily to submit to nonsuit at any time before the jury have rendered their verdict.

Wooster *vs.* Burr, 2 *Wend.*, 295.
Grah. Pr., 2 ed., 310.
Smith's Action, 137.
s. p., Bell *vs.* Gardner, 77 *Ill.*, 319.
Dove *vs.* Hanks, 3 *McCord* (*So. Car.*), 559.

Even after charge, and verdict made up, but not announced.

Graham *vs.* Tate, 77 *N. C.*, 120.
Tate *vs.* Phillips, *id.*, 126.
Root *vs.* Peeples, 48 *Geo.*, 592.

Not allowed after verdict published or delivered to one allowed by the Court to receive it.

Merchants Bank *vs.* Rawls, 7 *Geo.*, 191; s. c., 50 *Am. Dec.*, 394.

Allowed even after motion for compulsory nonsuit made on sufficient ground.
Pescud *vs.* Hawkins, 71 *N. C.*, 299.
s. r., Schafer *vs.* Weaver, 20 *Kans.*, 294.

Whether the jury leave their bench or not, plaintiff, by not answering when called, may preclude them from giving a verdict.
Cunningham *vs.* Duncan, *Anth. N. P.*, 61.

His silence is not assent to the reading of a verdict.
People *vs.* Mayor of Albany, 1 *Wend.*, 36.

2. — *statutory restrictions.*—In *New York*,[1] *Missouri*,[2] *Kansas*,[3] *Iowa*[4] and *Texas*,[5] this cannot be done after the cause has been submitted to the jury to consider of their verdict.

[1] *N. Y. Code Civ. Pro.*, § 1182.

[2] Fink *vs.* Bruihl, 47 *Mo.*, 173.
Savoni *vs.* Brashear, 46 *id.*, 345.

[3] Schafer *vs.* Weaver, 20 *Kans.*, 294.

[4] Harris *vs.* Beam, 46 *Iowa*, 118 (holding that it may be done, after the judge has directed a verdict, for the jury have not been then directed to retire nor to enter upon the consideration of the case without retiring).

[5] Frois *vs.* Mayfield, 31 *Tex.*, 366.
Peck *vs.* McKellar, 33 *id.*, 234.

3. — *the same.*—In *Massachusetts* and *New Hampshire* submitting to a voluntary nonsuit after the trial has begun, rests in the discretion of the Court; allowing it as matter of right, without the exercise of discretion, is error.

Truro *vs.* Atkins, 122 *Mass.*, 418.
Fulford *vs.* Converse, 54 *N. H.*, 543, and cas. cit.

Before the cause is opened to the jury it is matter of right.
Burbank *vs.* Woodward, 124 *Mass.*, 357.
Farr *vs.* Cate, 58 *N. H.*, 367.

4. — *the same.*—In *Pennsylvania* the statute terminates plaintiff's right to submit to a nonsuit at the point

when the jury, in response to the usual inquiry, have finally announced to the Court their readiness.

McLughan *vs.* Bo·ard, 4 *Watts (Pa.)*, 308, 316.
Easton Bk. *vs.* Coryell, 9 *Watts & S.*, 153.
Kates *vs.* Lewis, 2 *Penn. L. J. R.*, 268 (foot p. 53).

5. — *the same.*—In *Indiana*,[1] *Virginia*[2] and *Alabama*,[3] it cannot be done after the jury have retired.

[1]Dunning *vs.* Galloway, 47 *Ind.*, 182.
Helm *vs.* First Nat'l Bk., 91 *id.*, 44.
2 *Ind. R. S.*, 1876, p. 184; *Code*, § 363.

[2]4 *Minor's Inst.*, part 1, p. 782, etc.

[3]Blackburn *vs.* Minter, 22 *Ala.*, 613.

6. — *the same.*—In *California* it may be done at or before the close of the evidence on both sides.

Hancock Ditch Co. *vs.* Bradford, 13 *Cal.*, 637.

7. — *exceptional cases.*—But plaintiff cannot submit to a nonsuit against objection, where a claim by defendant for affirmative relief is well pleaded,[1] nor where plaintiff has already made a case which by statute entitles defendant to judgment.[2]

[1]Merchant's Bank *vs.* Schulenberg, 48 *Mich.*, 102; s. c., 19 *Northw. Rep.*, 741; abst. s. c., 30 *Alb. L. J.*, 22, and cases cited.

Otherwise of a mere set-off, not involving any cross-claim to relief.
Wooster *vs.* Burr, 2 *Wend.*, 295.
s. p., Riley *vs.* Carter, 3 *Humph. (Tenn.)*, 230.

[2]As in the case of an officer sued in the wrong county, and thereupon, under the statute, entitled to a verdict in his favor.
Hull *vs.* Southworth, 5 *Wend.*, 265.

8. *Withdrawal of juror.*—A judge has power, in his decretion, in case of surprise or other cause which would

render the progress of the trial unjust or unfair to either party, to withdraw a juror and postpone the trial.

Dillon *vs.* Cockroft, 90 *N. Y.*, 649 (*arguendo*).
Glendening *vs.* Canary, 5 *Daly*, 489; aff'd in 64 *N. Y.*, 636, without opinion.
Messenger *vs.* Fourth Nat'l Bk., 6 *Daly*, 190; s. c., 48 *How. Pr.*, 542, and cas. cit. (surprise).
People *vs.* Judges of N. Y. Com. Pl., 8 *Cow.*, 127 (defect in testimony).
S. P., St. John *vs.* Duncan, 2 *Monthl. L. Bul.*, 20 (defect in complaint).

The English practice requires consent of parties.

Such a withdrawal is no ground for a judgment of nonsuit.
Planer *vs.* Smith, 40 *Wisc.*, 31.

Where the parties *agree* to withdraw a juror, each party pays his own costs.
2 *Tidd's Pr.*, 2 *Am.* (from 8 *Lond.*) *ed.* 909.

XV.—TAKING THE CASE FROM THE JURY.

[In some jurisdictions the mode of taking the case from the jury is—if at the instance of the plaintiff,—by motion to direct a verdict; if at the instance of defendant, either by motion for a nonsuit, or by motion to direct a verdict, according to whether defendant is merely to put plaintiff out of Court, or to have a final adjudication against him. In these jurisdictions a motion for nonsuit is also called a motion to dismiss the complaint, the latter designation being more usual where the dismissal is on the pleadings; the former where it is on the proofs.

In some other jurisdictions the mode of taking the case from the jury is only by directing a verdict at the instance of either party.

In still others it is by demurrer to evidence.

The differences between these methods are to a great extent differences only in name and form of procedure; but there are consequent differences in the effect of the adjudication, which need not be noticed here.

The underlying principle of each of these methods is to dispose of the case by the decision of the judge if no proper question for a jury has been presented; and the rules which regulate the motion in either form and determine how it should be

decided, are in the main the same, and are here presented together as substantially applicable to all these modes of presenting the question; but with this noteworthy exception that, according to the weight of authority, a motion for nonsuit or to direct a verdict, after the evidence of both parties has been heard and closed, is determined on the whole case, a demurrer to evidence is determined only on the evidence of the demurree].

A. The Right to Take the Case From the Jury.

1. *Power of the Court.*—Upon an undisputed state of facts the Court may render the judgment or direct the verdict which the law requires without the aid or advice of the jury.

Appleby *vs.* Astor Fire Ins. Co., 54 *N. Y.*, 253, 260.
Oscanyan *vs.* Arms Co., 103 *U. S.* (13 *Otto*), 261, 266.
Hendrick *vs.* Lindsay, 93 *id.* (3 *Otto*), 143.
Bemis *vs.* Woodworth, 49 *Iowa*, 340.
Lane *vs.* Old Colony R. R. Co., 14 *Gray*, 143.

McLaren *vs.* Indianapolis & Vicennes R. R. Co., 83 *Ind.*, 319 (where it was held no error to recall the jury and direct a verdict for defendant).
Thomasson *vs.* Groce, 42 *Ala.*, 431.
Cutler *vs.* Hurlburt, 29 *Wisc.*, 152, 165.
Chenery *vs.* Palmer, 6 *Cal.*, 119, 122.
See also cases under paragraph 2 (*below*).

"In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."
Pleasants *vs.* Fant, 22 *Wall.*, 116, 120, and cas. cit.

This rule requires not merely undisputed testimony, but an undisputed state of facts; for if differences of fact may be drawn from undisputed testimony the case raises a question that the jury ought to pass upon.
See paragraph 16 (*below*).

And in those jurisdictions, where the "scintilla of evidence" doctrine prevails, the Court cannot take the case from the jury where there is any evidence tending to prove the issue.
Robinson *vs.* Louisville R. R. Co., 2 *Lea* (*Tenn.*), 594.
Smith *vs.* Gillett, 50 *Ill.*, 290.

"Undisputed" here does not, however, mean that the counsel shall have ceased to contest; but that in contemplation of law there should not be room for dispute.

For the various methods in which the rule in the text is applied in different jurisdictions see note to next section.

2. *Right of the party.*—In a case where it is proper to take the cause from the jury, the right of the party, and the power of the judge, are correlative; the right implies the duty.

Lomer *vs.* Meeker, 25 *N. Y.*, 361.
Pleasants *vs.* Fant, 22 *Wall.*, 116, 120, and cas. cit.

The reason is that the judge, if he understands the law applicable to the case, ought to protect parties against unjust verdicts, and ought not to occupy the jury, the parties and the public time in reaching a verdict (or possibly a disagreement) in a case, where, if a verdict adverse to his opinion were reached, it would forthwith be his duty to set it aside on motion for new trial.

The following analysis of the authorities shows in what jurisdictions this rule is now established; and in what it has been denied or qualified.

It should be added, that the practice in several jurisdictions which have not yet acceded to this rule appears to be in a transition state.

United States Courts—

Schuhardt *vs.* Allens, 1 *Wall.*, 359 (compulsory nonsuit after evidence taken is not allowed in the Federal Courts).

Insurance Company *vs.* Folsom, 18 *Wall.*, 237 (direction of a verdict is a matter of right in a proper case).

Pleasants *vs.* Fant, 22 *Wall.*, 116.

Merchants Nat. Bank *vs.* State Nat. Bank, 3 *Cliff.*, 205.

Retzer *vs.* Wood, 109 *U. S.*, 185 (error to refuse to direct a verdict for plaintiff in a proper case).

Alabama—

Smith *vs.* Seaton, *Minor*, 75 (in absence of statute Court has no power to grant compulsory nonsuit, but may direct the jury how to find; and if they disobey may grant new trial).

Saunders *vs.* Coffin, 16 *Ala.*, 421.

Arkansas—

Martin *vs.* Webb, 5 *Ark.*, 72; s. c., 39 *Am. Dec.*, 363 (Court has no power to grant compulsory nonsuit, but may direct jury to find as in case of nonsuit).

Hill *vs.* McLean, 14 *Ark.*, 706 (such a verdict bars a future action).

Obaugh *vs.* Finn, 4 *Ark.*, 110; s. c., 37 *Am. Dec.*, 773 (demurrer to evidence; dictum that in proper case it is a matter of legal right).

California—

Dalrymple *vs.* Hanson, 1 *Cal.*, 125 (nonsuit; error to refuse).

Johnson *vs.* Moss, 45 *Cal.*, 515.

Selden *vs.* Cushman, 20 *Cal.*, 56 (direction of a verdict granted in a proper case).

Connecticut—

Naugatuck R. R. Co. *vs.* Waterbury Button Co., 24 *Conn*, 468 (nonsuit authorized by a statute which is held not to be unconstitutional as violating the right of trial by jury).

Colorado—

Behrens *vs.* Kansas Pac. R. R. Co., 5 *Col.*, 400 (nonsuit seems matter of right).

Murphy *vs.* Cobb, *id.*, 281 (direction of a verdict, a duty in a proper case).

Dakota—

Holt *vs.* Van Eps., 1 *Dak.*, 206 (compulsory nonsuit not allowed).

Territory *vs.* Stone, 2 *Dak.*, 155 (direction of verdict proper when evidence is not sufficient to sustain a contrary verdict).

Delaware—

Flanagan *vs.* City of Wilmington, 4 *Houst.* (*Del.*), 546 (compulsory nonsuit allowed).

Federal Courts—(See head of the list above).

Florida—

Ferguson *vs.* Porter, 3 *Fla.*, 27 (direction of a verdict not allowable, it seems, as it contravenes a Florida statute).

Hinote *vs.* Simpson, 17 *Fla.* 444 (demurrer to evidence seems allowable in proper cases).

Georgia—

Tison *vs.* Yawn, 15 *Geo.*, 491 (nonsuit).

Hanson *vs.* Crawley, 51 *Geo.*, 528, 533 (direction of verdict for defendant at close of plaintiff's case, is not proper; but a motion for a nonsuit at that stage of the trial is the proper way to raise the question of sufficiency of plaintiff's evidence).

Illinois—

Holmes *vs.* Chicago & Alton R. R. Co., 94 *Ill.*, 439, 444 (nonsuit seems allowable only at close of plaintiff's case upon an entire failure of evidence as to an essential point. Motion to exclude all of the plaintiff's evidence is an equivalent remedy).

Compare Poleman *vs.* Johnson, 84 *Ill.*, 269 (where the power of the Court to nonsuit under the Illinois statute is questioned, but holding it error to deny motion to exclude all of the plaintiff's evidence upon an entire failure of proof on an essential point. Direction of verdict for defendant is a matter of right in such a case).

Pennsylvania Co. *vs.* Conlan, 101 *Ill.*, 93 (motion to exclude plaintiff's evidence is in the nature of a demurrer to evidence and is tested by the same rules).

Indiana—

Williams *vs.* Port, 9 *Ind.*, 551 (compulsory nonsuit not allowed).

Bool *vs.* Davis, 5 *Blackf.* (*Ind.*), 115; s. c., 33 *Am. Dec.*, 457.

Purcell *vs.* English, 86 *Ind.*, 34.

Crookshank *vs.* Kellogg, 8 *Blackf.* (*Ind.*), 256 (direction of verdict. Error to refuse).

Strough *vs.* Gear, 48 *Ind.*, 100 (demurrer to evidence allowable under Indiana Code of Procedure).

Iowa—

Way *vs.* Ill. Centr. R. R. Co., 35 *Iowa*, 585 (compulsory nonsuit not allowed by *Iowa R. S.*, §§ 3127, 3128).

Bemis *vs.* Woodworth, 49 *Iowa*, 340 (direction of a verdict proper on undisputed evidence).

Kansas—

Case *vs.* Hannahs, 2 *Kans.*, 490 (compulsory nonsuit not authorized by the *Kans. Code.* In case of total failure of proof on an essential point the Court should so instruct the jury).

Union Pacific R. R. Co. *vs.* Adams (*Kansas*, 1885), 6 *Pac. Rep.*, 529, and cas. cit. (error not to sustain demurrer to evidence).

Kentucky—

Parker *vs.* Jenkins, 3 *Bush* (*Ky.*), 588 (error to refuse to direct verdict where defense was established by uncontradicted evidence).

Hanks *vs.* Roberts, 3 *J. J. Marsh.* (*Ky.*), 298 (error to refuse to direct where evidence would not sustain a contrary verdict).

See Buford *vs.* Louisville, etc., R. R. Co., 5 *Ky. L. Rep. & J.*, 503, opposing Thompson *vs.* Thompson, 17 *B. Monr.*, 28.

Louisiana—

Wilson *vs.* McHugh, 1 *La.*, 380 (nonsuit proper if evidence is insufficient).

Maine—

White *vs.* Bradley, 66 *Me.*, 254 (nonsuit on uncontradicted evidence raising only question of law, held proper.

Heath *vs.* Jaquith, 68 *Me.*, 433, 436 (direction of a verdict proper when evidence will not authorize a verdict for opposite party).

State *vs.* Soper, 16 *Me.*, 293 (demurrer to evidence. Unusual and no error to refuse to receive it).

Maryland—

Rettlewell *vs.* Peters, 23 *Md.*, 312 (nonsuit not adopted and contrary to practice).

Baltimore & Ohio R. R. Co. *vs.* Stricken, 51 *Md.*, 47 (error to refuse to direct verdict when there is no evidence to sustain contrary verdict).

Massachusetts—

Mitchell *vs.* New England, etc., Ins. Co., 6 *Pick.*, 117, 118.

Marshall *vs.* Merritt, 97 *Mass.*, 516 (it seems that a nonsuit cannot be ordered against the plaintiff's consent. Compare, however, Wentworth *vs.* Leonard, 4 *Cush.*, 414, 418, SHAW, Ch. J).

Lane *vs.* R. R. Co., 14 *Gray* (*Mass.*), 143.

Denny *vs.* Williams, 5 *Allen*, 1.

Allyn *vs.* Boston & Albany R. R. Co., 105 *Mass.*, 77.

Tully *vs.* Fitchburg R. R. Co., 134 *Mass.*, 499 (direction of a verdict. Error to refuse in a proper case).

Copeland *vs.* New England Ins. Co., 22 *Pick.* (*Mass.*), 135, 143 (demurrer to evidence seems matter of right, but that it is rarely resorted to in Massachusett's practice, see Golden *vs.* Knowles, 120 *Mass.*, 336).

Michigan—

Cahill *vs.* Kalamazoo Mut. Ins. Co., 2 *Doug.* (*Mich.*), 124 (Court cannot compel nonsuit).

Grand Trunk R. Co. *vs.* Nichol, 18 *Mich.*, 170 (direction of a verdict; error to refuse where there is no conflicting evidence).

Minnesota—

McCormick *vs.* Miller, 19 *Minn.*, 443 (compulsory nonsuit allowed by statute).

Mississippi—

Winston *vs.* Miller, 12 *S. & M.*, 550, 554 (no power of compulsory nonsuit, but there is an equivalent remedy in directing a verdict against the plaintiff).

Ewing *vs.* Glidwell, 3 *How.* (*Miss.*), 332, 335 (no power to nonsuit, but Court may instruct jury to find a verdict as in case of nonsuit, and this is often done).

Chicago, etc., R. R. Co. *vs.* Doyle, 60 *Miss.*, 977 (direction of verdict seems matter of right in a proper case).

Missouri—

St. Louis Floating Dock Ins. Co. *vs.* Soulard, 8 *Mo.*, 665 (compulsory nonsuit not allowed).

Wells *vs.* Gaty, *id.*, 681.

Morgan *vs.* Durfee, 69 *Mo.*, 469; s. c., 9 *Cent. L. J.*, 12 (direction of verdict. Error to refuse in a proper case. Rule well stated).

Nebraska—

Smith *vs.* Sioux City, etc., R. R. Co., 15 *Nebr.*, 583; s. c., 19 *Northw. Rep.*, 638 (compulsory nonsuit not authorized by *Nebr. Civ. Code*, § 430. Error to grant it).

Atchison & Nebr. R. R. Co. *vs.* Losee, 4 *Nebr.*, 446 (direction of a verdict. Error to refuse).

Nevada—

Laws of Nevada, 1873, § 1212 (nonsuit allowed by statute when the plaintiff fails to prove a sufficient case for the jury).

New Hampshire—

Stickney *vs.* Stickney, 1 *Fost.*, 61 (nonsuit; error to refuse).

Bailey *vs.* Kimball, 6 *id.*, 351, 354.

Brown *vs.* Insurance Co., 58 *N. H.*, 298 (nonsuit; error to refuse).

Dame *vs.* Dame, 20 *N. H.*, 28 (direction of a verdict proper for insufficient evidence).

New Jersey—

New Jersey Express Co. *vs.* Nichols, 4 *Vroom*, 434, 438 (nonsuit; error to refuse).

Baldwin *vs.* Shannon, 43 *N. J. L.*, 596 (direction of a verdict proper where a verdict for opposite party would be set aside).

New Mexico—

Herrera *vs.* Chaves, 2 *New Mex.*, 86.

Montoyra *vs.* Donohue, *id.*, 214 (compulsory nonsuit cannot be granted).

New York—

Lomer *vs.* Meeker, 25 *N. Y.*, 361 (motion for nonsuit or to dismiss complaint, or to direct verdict; error to refuse).

Robinson *vs.* McManus, 4 *Lans.*, 380, 386.

Fish *vs.* Davis, 62 *Barb.*, 122.

Appleby *vs.* Astor Fire Ins. Co., 54 *N. Y.*, 253, 261 (motion to direct verdict equivalent to motion for nonsuit [but note that it is more serious in results]).

North Carolina—

Andrews *vs.* Pritchett, 66 *N. C.*, 387 (compulsory nonsuit cannot be granted).

Carleton *vs.* Byers, 71 *N. C.*, 331 (compulsory nonsuit improper, but Court may direct verdict for defendant).

Wittowski *vs.* Wasson, 71 *N. C.*, 451 (scintilla of evidence not enough to go to the jury).

Ohio—

Ellis *vs.* Ohio Life Ins., etc., Co., 4 *Ohio St.*, 628 (compulsory nonsuit allowed only on an entire failure of evidence as to some essential point. Substituted for the ancient practice of demurrer to evidence).

Powell *vs.* Jones, 12 *Ohio*, 35.

Oregon—

Tippin *vs.* Ward, 5 *Oreg.*, 450 (compulsory nonsuit).

Cogswell *vs.* Oregon & Cal. R. R. Co., 6 *Oreg.*, 417.

Pennsylvania—

Lehman *vs.* Kellman, 65 *Penn. St.*, 489 (compulsory nonsuit, but error will not lie to a refusal; for defendant may ask for direction that plaintiff's evidence is insufficient to maintain his action).

See also Borough of Easton *vs.* Neff, 102 *Penn. St.*, 474; s. c., 17 *Reporter*, 59.

Hyatt *vs.* Johnston, 91 *Penn. St.*, 196 (direction of verdict; error to refuse plaintiff in this case).

Rhode Island—

Hopkins *vs.* Brown, 5 *R. I.*, 357, 360 (compulsory nonsuit seems to be allowed only where there is total lack of evidence on an essential point).

Cassidy *vs.* Angell, 12 *R. I.*, 447, 448.

South Carolina—

Carrier *vs.* Dorrance, 19 *S. C.*, 30 (compulsory nonsuit only allowed on *entire* failure of evidence as to some essential point. Then error to refuse).

Graham *vs.* Moore, 13 *S. C.*, 115 (direction of a verdict, a duty in a proper case).

Tennessee—

Scruggs *vs.* Brackin, 4 *Yerg.*, 528.

Hunter *vs.* Sevier, 7 *id.*, 127, 134 (Courts have no power to nonsuit, nor to entertain demurrer to evidence).

Littlejohn *vs.* Fowler, 5 *Cold.*, 284 (nonsuit said to be unconstitutional).

Texas—

Guest *vs.* Guest, *Dallam* (*Texas*), 394.

McGill *vs.* Delaplain, *id.*, 493 (Court cannot compel a nonsuit).

Willis *vs.* Bullitt, 22 *Texas*, 330 (direction of a verdict in a proper case).

United States Courts—

(See head of the list above.)

Vermont—

Smith *vs.* Crane, 12 *Vt.*, 487 (Court cannot order nonsuit; error to do so).

Wright *vs.* Bourdon, 50 *Vt.*, 494 (direction of a verdict in a proper case).

Virginia—

Minor's Institutes, Vol. IV., p. 782 (Courts cannot compel nonsuit. Citing Ross *vs.* Gill, 1 *Wash.* (*Va.*), 87, 89; Thweat *vs.* Finch, *id.*, 217, 219).

Trout *vs.* Va. & Tenn. R. R. Co., 23 *Gratt.* (*Va.*), 619 (demurrer to evidence seems a matter of right).

Eubank *vs.* Smith, 2 *Hans.* (*Va.*), 206 (demurrer to evidence; Court has power to compel joinder in a proper case).

West Virginia—

Dresser *vs.* Transportation Co., 8 *W. Va.*, 553 (motion to exclude all of plaintiff's evidence at close of his case is governed by same rules as demurrer to evidence, and is allowed in a proper case).

Allen *vs.* Bartlett, 20 *W. Va.*, 46 (demurrer to evidence).

Wisconsin—

Hunter *vs.* Werner, 1 *Wisc.*, 141.

Hoeflinger *vs.* Stafford, 38 *id*, 391 (compulsory nonsuit; error to refuse).

Jackson *vs.* Jacksonport, 56 *Wisc.*, 310 (direction of a verdict proper when evidence, considered as undisputed, and aided by most favorable legitimate construction and all reasonable inferences, would not justify a contrary verdict).

Wyoming—

Mulhern *vs.* Union Pac. R. R. Co., 2 *Wy.*, 465 (compulsory nonsuit cannot be ordered).

3. *Test of the right to go to jury.*—The general test as to the propriety of refusing to submit a point to the jury is whether their verdict on the point if against the moving party, must be set aside as contrary to or against the weight of evidence.

Cagger *vs.* Lansing, 64 *N. Y.*, 417, 427; aff'g 4 *Hun*, 812.

Corning *vs.* Troy Iron & Nail Factory, 44 *N. Y.*, 577, 594.

Neuendorff *vs.* World Mut. Life Ins. Co., 69 *N. Y.*, 389.

Burt *vs.* Smith, 11 *Weekly Dig.*, 278; mem. s. c., 83 *N. Y.*, 606 (no opinion).
Fish *vs.* Davis, 62 *Barb.*, 122.
Wombough *vs.* Cooper, 2 *Hun*, 428; s. c., 4 *Supm. Ct.* (*T. & C.*), 586, and a case of negligence forms no exception to the rule.
Wilds *vs.* Hudson River R. R. Co., 24 *N. Y.*, 430
Pleasants *vs.* Fant, 22 *Wall.*, 116, 121.
Hendrick *vs.* Lindsay, 93 *U. S.* (3 *Otto*), 143.
Herbert *vs.* Butler, 97 *U. S.* (7 *Otto*), 319.
Bowditch *vs.* Boston, 101 *U. S.* (11 *Otto*), 16.
Griggs *vs.* Houston, 104 *U. S.* (14 *Otto*), 553.
Phœnix Mut. Ins. Co. *vs.* Doster, 106 *U. S.* (16 *Otto*), 30.
Montclair *vs.* Dana, 107 *U. S.* (17 *Otto*), 162.
Randall *vs.* Balt. & Ohio R. R. Co., 109 *U. S.*, 478.
Adams *vs.* Spangler (*Circ. Ct., D. Col.*), 17 *Fed. Rep.*, 133.
Connecticut Mut. Life Ins. Co. *vs.* Lathrop, 111 *U. S.*, 612; s. c., 17 *Reporter*, 677.
Bagley *vs.* Cleveland Rolling Mill Co. (*U. S. Circ. Ct., N. D. N. Y.*), 21 *Fed. Rep.*, 159 (where it is held to be the duty of the Court to direct a verdict for the plaintiff if a verdict for the defendant would be set aside as contrary to evidence).
Proffatt on Jury Trial, § 354, and cases cited.
Burnam *vs.* De Vaughn, 65 *Geo.*, 309.
Zettler *vs.* The City of Atlanta, 66 *Geo.*, 195.
Aycrigg *vs.* New York & Erie R. R. Co., 1 *Vroom* (*N. J.*), 468.
Baldwin *vs.* Shannon, 43 *N. J. L.*, 596.
Hunter *vs.* Warner, 1 *Wisc.*, 141.
Spensley *vs.* The Lancashire Ins. Co., 54 *Wisc.*, 433.
Jackson *vs.* Jacksonport, 56 *Wisc.*, 310.
Dalrymple *vs.* Hanson, 1 *Cal.*, 125.
Ensminger *vs.* McIntyre, 23 *Cal.*, 593, 594.
Weis *vs.* The City of Madison, 75 *Ind.*, 241.
Hyatt *vs.* Johnson, 91 *Penn. St.*, 196.
Brown *vs.* European & N. American R. R. Co., 58 *Me.*, 384.
Heath *vs.* Jaquith, 68 *Me.*, 433, 436. (Compare, however, State Co. *vs.* Tilton, 69 *Me.*, 244.)
Brown *vs.* Mass. Mut. Life Ins. Co., 59 *N. H.*, 298; s. c., 13 *Ins. L. J.*, 208, 211 (where it is also said that in applying the test it does not seem to be material whether the motion [for a nonsuit] is made at the close of the plaintiff's case, or whether it is delayed till all the evidence is in).

Chicago, etc., R. R. Co. *vs.* Doyle, 60 *Miss.*, 977.
Morgan *vs.* Durfee, 69 *Mo.*, 469; s. c., 9 *Cent. Law J.*, 12.
Atchison & Nebraska R. R. Co. *vs.* Losee, 4 *Nebr.*, 446.
Reynolds *vs.* Burlington & Miss. R. R. Co., 11 *Nebr.*, 186.
Buford *vs.* Louisville & Nashville R. R. Co. (*Jefferson Ct. Com. Pl.* [*Ky.*]), 5 *Ky. L. Rep. & J.*, 503 (*contra*, Thompson *vs.* Thompson, 17 *B. Mon.* [*Ky.*], 28).
Territory *vs.* Stone, 2 *Dak.*, 155.

The test would seem to be the same in Connecticut.
Compare Booth *vs.* Hart, 43 *Conn.*, 480, 484, with Osborne *vs.* Bradley, 46 *Conn.*, 465, 466.

In Massachusetts the rule as laid down in Denny *vs.* Williams, 5 *Allen*, 1, and apparently approved in Brooks *vs.* Somerville, 106 *Mass.*, 271, 275, is that "if the evidence is such that the Court would set aside any number of verdicts rendered upon it, *toties quoties*, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that though one or two verdicts rendered upon it would be set aside upon motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under proper instructions."

B. Mode of Applying to Take Case From Jury.

4. *Defendant's motion,—when.*—Neither a nonsuit,[1] nor a direction of a verdict[2] for the defendant, nor a demurrer to evidence,[3] is proper before the plaintiff has closed his case.[4]

But a motion to dismiss for insufficiency of the complaint may be made at any stage of the case[5] before evidence of the necessary facts omitted to be alleged has been received without specific objection.[6]

[1] Walker *vs.* Supple, 54 *Geo.*, 178.
s. p., Nixon *vs.* Brown, 4 *Blackf.* (*Ind.*), 157.

[2] Miller *vs.* House, 63 *Iowa*, 82; s. c., 18 *Northw. Rep.*, 708.

[3] Proprietary *vs.* Ralston, 1 *Dall.*, 18.

[4]Not even where he has made a *prima facie* case against himself, if by evidence not conclusive against contradiction by him.

Miller *vs.* House, 63 *Iowa*, 82; s. c., 18 *Northw. Rep.*, 708.

So, too, it is error to nonsuit at the close of the defendant's case without giving the plaintiff an opportunity to rebut or contradict defendant's evidence.

Metzger *vs.* Herman, 12 *N. Y. Weekly Dig.*, 181.

[5]Scofield *vs.* Whitelegge, 49 *N. Y.*, 259; s. c., 12 *Abb. Pr., N. S.*, 320; aff'g 10 *id.*, 104.

[6]Reck *vs.* Phœnix Ins. Co., 3 *Civ. Pro. R.* (*Browne*), 376, 379.

5. — *after strict cross-examination.*—The case may be taken from the jury after plaintiff's evidence is closed, although the defendant has cross-examined plaintiff's witnesses, if not going beyond strict cross-examination.

Eastman *vs.* Howard, 30 *Me.*, 58; s. c., 50 *Am. Dec.*, 611 (where the qualification above stated is not expressed, but implied).

The fact that defendant had set up a counter claim will not defeat his motion.

Slocum *vs.* Minneapolis Millers' Assoc. (*Minn.*, 1885), 23 *Northw. Rep.*, 862.

6. — *after full cross-examination.*—A defendant who has carried his examination of plaintiff's witnesses beyond the limits of a strict cross-examination, and brought out affirmative evidence properly part of his own case, cannot move for a nonsuit, etc., until plaintiff has had an opportunity of rebuttal.

This rule necessarily results from the nature and limits of the right to nonsuit.

7. — *after final close of case.*—The case may be taken from the jury on the whole evidence, including defendant's, after plaintiff's rebuttal.

Lomer *vs.* Meeker, 25 *N. Y.*, 361.

Brown *vs.* Ins. Co., 59 *N. H.*, 298.

And the judge may do this notwithstanding he had denied defendant's motion for a nonsuit at the close of plaintiff's case.
Fitch *vs.* Hassler, 54 *N. Y.*, 677.

These cases do not clearly indicate plaintiff's right to be heard in rebuttal (if defendant has given evidence in his own behalf, beyond strict cross-examination) before he can be nonsuited on defendant's evidence with his own, but the right is clear.
Metzger *vs.* Herman, 12 *N. Y. Weekly Dig.*, 181.

8. — *several co-defendants.*—One of several co-defendants may move for a nonsuit as to himself only.

So held even where another had defaulted; otherwise at common law.
Lomer *vs.* Meeker, 25 *N. Y.*, 361, and cas. cit.

9. — *several co-plaintiffs.*—A nonsuit may be granted as to one of several co-plaintiffs;[1] and it is error to grant it as to all, for misjoinder of an unnecessary plaintiff.[2]

[1] Simar *vs.* Canaday, 53 *N. Y.* 298 · s. c., 13 *Am. R.*, 523. Otherwise at common law.
[2] *Id.*
Fuller *vs.* Fuller, 5 *Hun*, 595 (nonsuit refused though a joint action was brought on a several interest).

10. — *several causes of action.*—The fact that plaintiff has proved a cause of action not alleged in his complaint, does not prevent the granting of a nonsuit for an entire failure to prove the cause which was alleged,[1] unless the evidence was received without objection and was pertinent solely to the cause of action proved.[2]

[1] Southwick *vs.* First Natl. B'k of Memphis, 84 *N. Y.*, 420.
[2] N. Y. Central Ins. Co. *vs.* National Ins. Co., 14 *N. Y.*, 85.

11. — *plaintiff's course to defeat motion.*—A motion for a nonsuit, or to direct a verdict, or a demurrer to evidence, though interposed on a sufficient ground, may be

defeated by the exercise of the common law right of submitting to a voluntary nonsuit,[1] or by getting leave of the judge to withdraw a juror,[2] or to reopen the case and give further evidence.[3]

[1] Harris *vs.* Beam, 46 *Iowa*, 118.
Pleasants *vs.* Fant, 23 *Wall.*, 116, 123.
Pescud *vs.* Hawkins, 71 *N. C.*, 299.

But not by asking to discontinue when the cause is called and without giving evidence.
Duncan *vs.* De Witt, 7 *Hun*, 184.

In some States voluntary nonsuit is discretionary with the Court; see pp. 106, 107, of this brief.

[2] Van Syckles *vs.* Perry, 3 *Robt.*, 621.

This application is discretionary.

[3] Hunt *vs.* Maybee, 7 *N. Y.*, 266, 273.
May *vs.* Hanson, 5 *Cal.*, 360.
Abbey Homestead Assoc. *vs.* Willard, 48 *Cal.*, 614.
Wadsworth *vs.* Thompson, 18 *Geo.*, 709.
McColgan *vs.* McKay, 25 *Geo.*, 631.
Larman *vs.* Huey, 13 *B. Mon.* (*Ky.*), 436.

This application is discretionary.
Hunt *vs.* Maybee, 7 *N. Y.*, 266.
Reed *vs.* Barber, 3 *Code R.*, 160.

But a refusal to exercise discretion is error.
Lewis *vs.* Ryder, 13 *Abb. Pr.*, *N. S.*, 1.

12. *Plaintiff's motion for a verdict.*—Where the question, after defendant's case is closed, is in like manner entirely one of law, the judge may direct a verdict for the plaintiff.

Anderson Co. Commissioners *vs.* Beal, 113 *U. S.*, 227, 241, and cas. cit.
People *vs.* Cook, 8 *N. Y.*, 67, 75.
Bemis *vs.* Woodworth, 49 *Iowa*, 340.

The motion cannot be granted before defendant's case is closed.
Kingsford *vs.* Hood, 105 *Mass.*, 495.

C. Rules of Decision.

13. *Contents of pleading to be considered together.*—Where admissions in a pleading are relied on as a ground for taking the case from the jury, all the connected admissions and allegations must be taken together. It is not proper to direct a verdict if the effect of admissions is qualified by allegations on which defendant has a right to go to the jury.

Goodyear *vs.* De La Vergne, 10 *Hun*, 537.

14. *General rule as to assuming truth of adversary's evidence.*—On an application to take the case from the jury, whether by motion for a nonsuit,[1] or a direction of a verdict,[2] or by demurrer to evidence,[3] the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.

[1] Fairfax *vs.* N. Y. Cent. R. R. Co., 40 *Super. Ct.* (*J. & S.*), 128; rev'd in 67 *N. Y.*, 11, on other grounds.
Myers *vs.* Dixon, 45 *How. Pr.*, 48; s. c., 35 *N. Y. Super. Ct.* (*J. & S.*), 390.
Cook *vs.* N. Y. Cent. R. R. Co., 1 *Abb. Ct. App. Dec.*, 432.
Maynes *vs.* Atwater, 88 *Penn. St.*, 496.
Walker *vs.* Supple, 54 *Geo.*, 178, 180.
Frost *vs.* Gibson, 59 *Geo.*, 600, 602.
Smyth *vs.* Craig, 3 *Watts & S.* (*Penn.*), 14.
Bevan *vs.* Ins. Co., 9 *id.*, 187.

[2] Parks *vs.* Ross, 11 *How.* (*U. S.*), 373.
Purcell *vs.* English, 86 *Ind.*, 34.
Pratt *vs.* Stone, 10 *Ill. App.*, 633.
Bishops *vs.* McNary, 2 *B. Mon.* (*Ky.*), 132; s. c., 36 *Am. Dec.*, 592.
Gallatin *vs.* Bradford, 1 *Bibb* (*Ky.*), 209.
s. p., Stone *vs.* C. & N. W. R. R. Co., 47 *Iowa*, 82.

[3] Christie *vs.* Barnes (*Kans.*, 1885), 6 *Pac. Rep.*, 599, and cas. cit.

15. *Sufficiency of evidence.*—To authorize the submission of a question of fact to the jury, it is not enough that there was a mere scintilla of evidence.

Baulec *vs.* N. Y. & Harlem R. R. Co., 59 *N. Y.*, 356; s. c., 17 *Am. R.*, 325; aff'g, in effect, 12 *Abb. Pr., N. S.*, 310; 5 *Lans.*, 436, and 62 *Barb.*, 623.

Commissioners *vs.* Clark, 94 *U. S.* (4 *Otto*), 278, 284. In this case the Court say: "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Raby *vs.* Cell, 85 *Penn. St.*, 80 (where it is said that the rule that a scintilla of evidence must go to the jury has been justly exploded both in England and in Pennsylvania).
Matlock *vs.* Mann, 37 *Leg. Int.*, 349.
Wittowsky, *vs.* Wasson, 71 *N. C.*, 451.
Nolan *vs.* Shickle, 3 *Mo. App.*, 300.

And, in general, it may be said that even in those jurisdictions where the doctrine that a mere scintilla of evidence must go to the jury seemed to be well established, the tendency of recent decisions has been to repudiate it and to adopt the test laid down above (paragraph 3) and now applied in nearly all jurisdictions.

As illustrations of this change in the law, see the cases above, and compare
Mercier *vs.* Mercier, 43 *Geo.*, 323, 325, with
Zettler *vs.* City of Atlanta, 66 *Geo.*, 195; and
Crookshank *vs.* Kellogg, 8 *Blackf.* (*Ind.*), 256, with
Weis *vs.* City of Madison, 75 *Ind.*, 241.

In a few States a scintilla of evidence is still allowed to go to the jury.

There are decisions to this effect in Arkansas, South Carolina, Iowa, Ohio, Illinois, and, it seems, in Kentucky and Nebraska.
Little Rock & Fort Smith R. R. Co. *vs.* Perry, 37 *Ark.*, 164.
State *vs.* Boles, 18 *So. Car.*, 534.
Muldowney *vs.* Ill. Cent. R. R. Co., 32 *Iowa*, 176.

Way *vs.* Ill. Cent. R. R. Co., 35 *Iowa*, 585 (where the Court says: "Where there is evidence tending in any degeee to establish the cause of action, however slight it may be, the questions of fact involved in it should primarily be left to the jury to find. * * * Hence it is the duty of a *nisi prius* Court in this State to submit the case to the jury upon the evidence when it only *tends even* to prove it, although the Court should feel in duty bound to set aside a verdict for the plaintiff, if the jury should so find. In other States a different and perhaps better and more consistent rule obtains whereby the Court may direct the jury how to find when it would set aside a verdict otherwise").

Ellis *vs.* Ohio Life and Trust Co., 4 *Ohio St.*, 628, 645.

Dick *vs.* Railroad Co., 38 *id.*, 389.

Phelps *vs.* Jenkins, 4 *Scam.* (*Ill.*), 48.

Chicago, etc., R. R. Co. *vs.* Sykes, 96 *Ill.*, 162, 176.

Pemberton *vs.* Williams, 87 *Ill.*, 15.

Guerdon *vs.* Corbett, 87 *Ill.*, 272.

[For the conflict of opinion in *Kentucky*, see 5 *Ky. L. Rep.*, 503.]

Smith *vs.* Sioux City, etc., R. R. Co., 15 *Nebr.*, 583; s. c., 19 *Northw. Rep.*, 638.

But even in those jurisdictions where the scintilla of evidence doctrine prevails, a total failure of evidence as to the whole case, or a total lack of evidence in support of some one essential element of the cause of action or defense renders it the duty of the Court to refuse to submit the case to the jury, and to either direct a nonsuit, or to instruct the jury how to find.

Carrier *vs.* Dorrance, 19 *So. Car.*, 30.

Ellis *vs.* Ohio Life and Trust Co., 4 *Ohio St.*, 628, 646.

Dick *vs.* Railroad Co., 38 *Ohio St.*, 389.

Muldowney *vs.* Ill. Cent. R. R. Co., 32 *Iowa*, 176.

Way *vs.* Ill. Cent. R. R. Co., 35 *Iowa*, 585.

Phelps *vs.* Jenkins, 4 *Scam.* (*Ill.*), 48.

16. *Different inferences.*—It does not follow that because there is no contradictory testimony the Court must take the question from the jury and determine it as one of law. On the contrary, if different results would be reached by different minds the question must go to the jury.

Wait *vs.* Agricultural Ins. Co., 13 *Hun*, 371 (action on a fire policy; the question being whether the house was "unoccupied").

So if a witness is contradicted by circumstances the question should go to the jury.

Elwood *vs.* Western Union Tel. Co., 45 *N. Y.*, 549, 554.

S. P., Hackford *vs.* N. Y. Centr., etc., R. R. Co., 53 *id.*, 654.

Smith *vs.* Coe, 55 *id.*, 678 (facts, not simply evidence, must be clear).

Heyne *vs.* Blair, 62 *id.*, 19.

Morse *vs.* Erie R. R. Co., 65 *Barb.*, 491.

Van Ostrand *vs.* O'Brien, 1 *Weekly Dig.*, 312.

Vinton *vs.* Schwab, 32 *Vt.*, 612 (where the question of defendant's negligence was held to have been properly submitted to the jury, although there was no conflict in the testimony).

Lindsay *vs.* Lindsay, 11 *Vt.*, 621.

Kane *vs.* Learned, 117 *Mass.*, 190, 194, and cas. cit.

Lane *vs.* R. R. Co., 14 *Gray*, 143.

Kansas Pacific R. R. Co. *vs.* Painter, 14 *Kan.*, 37, 53 (citing Railroad Co. *vs.* Stout, 17 *Wall.*, 657, and Detroit R. R. Co. *vs.* Van Steinberg, 17 *Mich.*, 99).

Luke *vs.* Calhoun Co., 52 *Ala.*, 115 (to the effect that if the jury can draw any inferences from the plaintiff's evidence, fatal to his recovery, they should not be instructed to find for him, even though the evidence strongly tending to support his case is uncontradicted).

Dolfinger *vs.* Fishback, 12 *Bush* (*Ky.*), 475 (where the rule is well stated).

N. J. Express Co. *vs.* Nichols, 3 *Vroom* (*N. J.*), 166.

Atchison & Nebraska R. R. Co. *vs.* Bailey, 11 *Nebr.*, 332.

But although inferences are generally for the jury, yet where they are certain and incontrovertible the case may be decided as one of law by the Court.

Thurber *vs.* Harlem, etc., R. R. Co., 60 *N. Y.*, 326, 331.

Dolfinger *vs.* Fishback 12 *Bush* (*Ky.*), 475.

So, too, where an inference originally an inference of fact to be drawn or not, in the opinion of the jury, becomes in the course of commercial and legal experience obvious and well known, the Court are justified in treating it as a matter of law.

For instances see Armstrong *vs.* Stokes, *L. R.*, 7 *Q. B.*, 598, 605;

Hutton *vs.* Bullock, *L. R.* 8 *Q. B.*, 331, 334.

17. *Interested testimony.*—Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to the jury.[1]

To constitute an interested witness within this rule it is not necessary that he should have a legal interest in the result of the litigation.[2]

[1] Hodge *vs.* City of Buffalo, 1 *Abb. N. C.*, 356; s. c., 1 *Buff. Super. Ct.* (*Sheldon*), 418, and see Elwood *vs.* Western Union Tel. Co., 45 *N. Y.*, 549, 554.
Gildersleeve *vs.* Landon, 73 *N. Y.*, 609.
Nicholson *vs.* Connor, 8 *Daly*, 21.
See also Sheridan *vs.* Mayor, etc., N. Y., 8 *Hun*, 424; reversed on other grounds in 68 *N. Y.*, 30.

[2] Kavanagh *vs.* Wilson, 70 *N. Y.*, 177 (where the only witness to prove a contract was a son of the plaintiff who was engaged in plaintiff's business upon a salary and was to be paid a fee in case the contract drawn by him "went through;" and hence held error to take the case from the jury and direct a verdict for the plaintiff).

And see also the recent case of Wohlfahrt *vs.* Beckert, 12 *Abb. N. C.*, 478; s. c., 92 *N. Y.*, 490 (where the interest of the witness, a clerk in the defendant's drug store, consisted in shielding himself and his employer from the charge of criminal negligence in omitting to label a poisonous drug which had caused the death of the plaintiff's intestate).

The same principle applies whether the testimony is to the whole case or to any specific fact essential to the case.

18. *Party's admission by refusal to testify.*—The refusal of a party to a suit, when testifying as witness, to answer a material question on the ground that it might criminate himself, is sufficient to go to the jury as evidence against him on the point inquired of, and makes it error to withdraw that question from them.

Andrews *vs.* Frye, 104 *Mass.*, 234.

19. *Direct met by circumstantial evidence.*—Where the direct evidence on one side, although uncontradicted,

is met by circumstantial evidence on the other, the question should be submitted to the jury.

Babcock *vs.* Chicago & N. W. R. R. Co., 17 *Rep.* (*Iowa*), 619; s. c., 1 *Am. L. J.*, 84.
s. p., Artisans' Bank *vs.* Backus, 36 *N. Y.*, 100.

But where positive testimony is met only by belief or impressions there is no conflict of evidence; and a finding is not conclusive, but against evidence, which rejects the former for the latter.
Dresser *vs.* Van Pelt, 1 *Hilt.* (*N. Y.*), 316.

20. *Affirmative testimony met only by negative.*—Affirmative testimony met only by negative testimony as to the same occurrence does not necessarily constitute such a conflict of testimony or raise such doubts as to require the question to be submitted to the jury.

Culhane *vs.* N. Y. Central & H. R. R. R. Co., 60 *N. Y.*, 133.
McKeever *vs.* The same, 88 *id.*, 667; s. c., more fully, 14 *Weekly Dig.*, 226.
Compare Byrne *vs.* The same, 14 *Hun*, 323.
Cheney *vs.* The same, 16 *Hun.* 415; and Salter *vs.* Utica & Black River R. R. Co., 59 *N. Y.*, 631, rev'g without opinion 3 *Supm. Ct.* (*T. & C.*), 800, and holding that negative testimony, as to the ringing of the bell of a locomotive, by witnesses who were giving attention, and who contradict positive testimony, makes a question on conflicting evidence proper for the jury.

21. *Positive, met only by a conclusion of law.*—Positive testimony met only by testimony to a conclusion of law does not constitute a conflict of testimony requiring the case to be submitted to the jury.

Sanborn *vs.* Lefferts, 16 *Abb. Pr.*, *N. S.*, 42; s. c., 58 *N. Y.*, 179.

22. *Uncontradicted evidence of specific fact.*—Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses not appearing to

be interested, it is error to submit it to the jury against objection.

Merely raising a question as to the credibility of a witness who is unimpeached does not take the case out of the rule.

Robinson *vs.* McManus, 4 *Lans.*, 380, 387 (as qualified by the rule in Hodge *vs.* City of Buffalo, 1 *Abb. N. C.*, 356.
Newton *vs.* Pope, 1 *Cow.*, 109; approved in 45 *N. Y.*, 553.
Harriman *vs.* Queen Ins. Co., 49 *Wisc.*, 71.
Berg *vs.* Chicago, Milwaukee, etc., R. R. Co., 50 *Wisc.*, 419.
Scott *vs.* Clayton, 54 *id.*, 499.
Lange *vs.* Perley, 47 *Mich.*, 352.

So too it is error to submit a question of fact to the jury when there is no evidence in support of it, or where the evidence is all one way.
Alger *vs.* Gardner, 54 *N. Y.*, 60.
Insurance Co. *vs.* Baring, 20 *Wall.*, 159, 162.
Meguire *vs.* Corwine, 101 *U. S.* (11 *Otto*), 108, 111.
United States *vs.* One Still, 5 *Blatchf.*, 403.

22[a]. *Expert testimony.*—The testimony of experts on a point to which other witnesses would not be competent to testify, if positive, to a matter of fact, and not mere matter of opinion on facts laid before the jury, is within the above rule; but if the question is not one which only experts are capable of determining, or their testimony is matter of opinion on facts before the jury, the question must be submitted to the jury.

I understand this to be the practical test, although the distinction is not made clear by the reported cases:
Compare:
Leitch *vs.* Atlantic Mut. Ins. Co., 66 *N. Y.*, 100, 108;
Cornish *vs.* Farmbuildings Fire Ins. Co., 74 *N. Y.*, 295, 298.

Where the evidence of a party on an essential point consists mainly of the testimony of experts it seems that

the case should go to the jury, unless the testimony leaves no reasonable doubt of the facts in issue.

Spensley *vs.* Lancashire Ins. Co., 11 *Ins. L. J.*, 383, citing Copp *vs.* German-American Ins. Co., 51 *Wisc.*, 643 (where the reason assigned is, that there are usually elements of doubt, uncertainty and inconclusiveness in expert testimony which it is for the jury to pass upon).

23. *Nominal damages.*—A motion for nonsuit is properly denied if plaintiff is entitled to recover even nominal damages.

Van Rensselaer *vs.* Jewett, 2 *N. Y.*, 135.
Weber *vs.* Kingsland, 8 *Bosw.*, 415.
Lillie *vs.* Hoyt, 5 *Hill* (*N. Y.*), 395; s. c., 40 *Am. Dec.*, 360.

24. *Mode of taking case from jury.*—In those jurisdictions where compulsory nonsuit or dismissal of complaint is allowed, the Court should not, against plaintiff's objection, direct a verdict for the defendant instead of ordering a non-suit, unless the ground for taking the case from the jury is such as to constitute a final bar to plaintiff's cause of action.

Briggs *vs.* Waldron, 83 *N. Y.*, 582; aff'g 9 *Weekly Dig.*, 219.

D. VERDICT SUBJECT TO OPINION OF COURT (SPECIAL CASE).

25. *When may be directed.*—Where the facts are indisputable, and only questions of law are raised, and no exceptions have been taken the determination of which could affect the proofs, the judge may direct the jury to render a verdict, subject to the opinion of the Court.

N. Y. Code Civ. Pro., § 1185.
Howell *vs.* Adams, 68 *N. Y.*, 314; aff'g 1 *Supm. Ct.* (*T. & C.*), 425.
13 *Abb. N. C.*, 382, *note.*
S. P., Baylis *vs.* Travelers Ins. Co., 113 *U. S.*, 316.

The effect is that in entering the verdict it is expressed to be subject to the opinion of the Court; and this will prevent judgment on the verdict until the Court have passed on the questions of law, and leaves it in the power of the trial judge, on subsequent motion, to set aside the verdict on the ground of the insufficiency of the evidence.

Baylis *vs.* Travelers Ins. Co., 113 *U. S.*, 316.

In this case Matthews, J., says: "If, after the plaintiff's case had been closed, the Court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this Court. * * * * * Or, if in the present case, a verdict having been taken for the plaintiff by direction of the Court, subject to its opinion whether the evidence was sufficient to sustain it, the Court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict, on the ground of the insufficiency of the evidence, it would have followed a common practice, in respect to which error could not have been alleged, or it might, with propriety, have reserved the question, what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. But, without a waiver of the right of trial by jury, by consent of parties, the Court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon" (Judgment reversed for error in so doing). See also, 13 *Abb. N. C.*, 382, *note.*

Under the New York Statute, the judge, on motion at the same term as the trial, may order judgment on the verdict or may set aside the verdict and direct judgment for either party.

N. Y. Code Civ. Pro., § 1185.

26. *Contest as to facts.*—A verdict may be directed, subject to the opinion of the Court, when the evidence as matter of law leaves no question of fact for the jury, although counsel still controvert the facts.

McBride *vs.* Farmers Bank, 26 *N. Y.* 450; aff'g 25 *Barb.*, 657.

27. *Questions of evidence.*—Under the New York statute it is error to direct that the verdict be subject to the opinion of the Court, even upon failure to object, if exceptions have been taken on questions of evidence, or if there is a conflict of evidence to go to the jury.[1]

If there are any questions of fact for the jury, a verdict subject to the opinion of the Court cannot be directed even if accompanied with answers by the jury to special questions determining the facts.[2]

[1] Purchase *vs.* Matteson, 25 *N. Y.*, 211; s. c., 15 *Abb. Pr.*, 402.
Matson *vs.* Farm Buildings Ins. Co., 73 *N. Y.*, 310; s. c., 29 *Am. R.*, 149; rev'g 9 *Hun*, 415.
13 *Abb. N. C.*, 382, *note.*

The question whether there is sufficient evidence to go to the jury may be reserved.
Wilde *vs.* Trainor, 59 *Penn. St.*, 439.
Koons *vs.* Western Union Tel. Co., 102 *Id.*, 164.

[2] Gilbert *vs.* Beach, 16 *N. Y.*, 606 (but *query* ?).

28. *Determining amount.*—The verdict directed must determine the amount of recovery, if any, as well as indicate the successful party. The determining of amount cannot be reserved for a reference.

Buchanan *vs.* Cheeseborough, 5 *Duer*, 238.
Belden *vs.* Davies, 2 *Hall*, 433.
But see Bartels *vs.* Redfield, 16 *Fed. Rep.*, 336, where this was done.

29. *Effect of consent.*—A verdict may be directed, subject to the opinion of the Court, notwithstanding exceptions taken, if the parties agree as to the facts, thereby waiving all exceptions.

Byrnes *vs.* City of Cohoes, 67 *N. Y.*, 204, 207.

XVI.—COUNSEL'S ADDRESS TO THE JURY.

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1. *Election as to cause of action.*—At the close of the evidence, if the pleading states the same substantial cause of action in different forms or counts and the evidence applies to both, the Court may require plaintiff to elect which count he will rely on,[1] or may allow him to change an election previously made.[2]

[1] Roberts *vs.* Leslie, 46 *Super. Ct.* (*J. & S.*), 76.

[2] McLennan *vs.* McDermid, 52 *Mich.*, 468; s. c., 18 *Northw. Rep.*, 222.

2. *The right to address the jury.*—When there is a question of fact to be submitted to the jury, a party has the right to be heard in argument to the jury within the limits hereafter stated; and an exception lies to the refusal of the right.

Cartright *vs.* Clopton, 25 *Geo.*, 85, 88 (holding it would be error to refuse to allow anything more than "stating his points").

The *dictum* to the contrary, in People *vs.* Cook, 8 *N. Y.*, 67, 77, is unsound.

But if he does not avail himself of the opportunity when offered, it is in the discretion of the Court whether afterwards to allow him to address the jury.
Herrington *vs.* Pouley, 26 *Ill.*, 94.

When the Court direct a verdict fixing its nature and extent, it is not error to refuse to allow argument to the jury.
Harrison *vs.* Park, 1 *J. J. Marsh.* (*Ky.*), 170.

3. — *third person.*—*Amicus curiæ* is not entitled to be heard where the parties are attended by competent counsel; nor is counsel in another cause between other parties entitled to be heard merely because the same question arises in both.

Nauer *vs.* Thomas, 13 *Allen*, 572, 574.

4. *Right to close.*—He who holds the affirmative on the issues which are to be submitted to the jury has the right to close.[1]

But if the party having such affirmative has failed to produce any evidence, it is not error to give the right to close to the other party.[2]

[1] Mead *vs.* Shea, 92 *N. Y.*, 122.
Page *vs.* Carter, 8 *B. Mon.* (*Ky.*), 192.
Daviess *vs.* Arbuckle, 1 *Dana* (*Ky.*), 525.
Williams *vs.* Allen, 40 *Ind.*, 295.

Even though the other party gave no evidence.
Worsham *vs.* Goar, 13 *Ala.* (4 *Port.*), 441.

[2] Zehner *vs.* Kepler, 16 *Ind.*, 290, 294.
Young *vs.* Haydon, 3 *Dana* (*Ky.*), 145.

There has been much the same conflict of authority on this question as in respect to the right to open. See Division IV. of this Brief.

5. *When to be asked.*—A request for a ruling on the order in which counsel shall address the jury can prop-

erly be made only after the whole evidence is in,[1] and before arguments are heard.[2]

[1]Mead *vs.* Shea, 92 *N. Y.*, 122, 124.

[2]McKibbon *vs.* Folds, 38 *Geo.*, 235, 239.

6. *Number of counsel.*—Only one counsel on each side is heard,[1] except that where several defendants appear by separate attorneys and have separate counsel, they will each be heard, unless their interests are in unison, in which case the Court may require them to select one of the counsel to be heard for all.[2]

[1]2 *Tidd's Pr.*, 2 *Am.* (*from 8th Lond. ed.*), 909.
Grah. Pr., 742.
N. Y. Rule, 29 of 1884.

[2]Sodousky *vs.* McGee, 4 *J. J. Marsh.* (*Ky.*), 267.

7. *Length of argument.*—The length of time to be occupied may be limited by the Court in the exercise of a sound discretion.[1] For an abuse of the discretion an exception lies.[2]

[1]Trice *vs.* Hannibal & St. Jo. R. R. Co., 35 *Mo.*, 416.
Burson *vs.* Mahoney, 6 *Baxt.* (*Tenn.*), 304, 307.

[2]White *vs.* People, 90 *Ill.*, 117 (criminal case).

8. *Asking jury to take notes.*—It is irregular to allow counsel to procure jurors to take notes of his calculations or other statements in argument, and to permit them to take out memoranda made on counsel's suggestion.

Indianapolis, etc., R. R. Co. *vs.* Miller, 71 *Ill.*, 463 (reversing judgment for this and other errors).

9. *Right, notwithstanding conflict in evidence.*—Counsel has a right to argue to the jury upon facts as to which there is a conflict of evidence, if there be evidence to go to the jury.

Logan *vs.* Munroe, 20 *Me.*, 257.

10. *Evidence which was incompetent.*—Counsel has a right to argue to the jury on facts as to which evidence has been received without objection, although the evidence may have been incompetent.

Free *vs.* State, 1 *McMull.* (*So. Car.*), 494 (criminal case).

11. *Comments on kind of evidence.*—Counsel has a right to comment on the bias of a witness;[1] on the fact that a person shown to be an important witness for the adverse party, and within reach, was not called on his behalf;[2] and that the adverse party failed to appear as a witness in his own behalf,[3] or that he has failed to put in evidence documents shown to be within his power and to contain relevant evidence.[4]

[1] Central R. R. Co. *vs.* Mitchell, 63 *Geo.*, 173, 180.

[2] Gavigan *vs.* Scott, 51 *Mich.*, 373; s. c., 16 *Northw. Rep.*, 769. And see p. 152 of this Brief.
Gray *vs.* Burk, 19 *Tex.*, 228, 233.

[3] Even where the omission was pursuant to stipulation.
Hurd *vs.* Marple, 10 *Ill.* (*App.*), 418, 424.

[4] Huntsman *vs.* Nichols, 116 *Mass.*, 521, 526.

For the rule in *Maine*, see Tobin *vs.* Shaw, 45 *Me.*, 331.

12. — *on form of deposition.*—The mode in which interrogatories put to a witness are framed and put is a proper subject of comment by counsel.

Smiley *vs.* Burpee, 5 *Allen* (*Mass.*) 568.

13. — *on objections and rulings.*—Counsel has no right to comment to the jury on the objection of the opposite party to evidence, and the judge's ruling thereon.

Mitchell *vs.* Borden, 8 *Wend.*, 570.

14. — *counter explanations.*—It is not error to allow counsel of a party whose course in the non-production of evidence promised in his opening has been commented

upon by the adverse counsel, to state the reasons for such course.

Blake *vs.* People, 73 *N. Y.*, 586.

15. *Referring to the pleadings.*—It is not error to allow counsel to refer to or read from the pleadings for the purpose of showing the jury what are the questions in issue.[1]

But it is not a matter of right to read the pleadings to the jury unless they have been put in evidence.[2]

[1]Rowe *vs.* Comley, 1 *City Ct.*, 466; s. c., 2 *Civ. Pro. R.* (*Browne*), 424 (saying that a party has a right in summing up to refer to the pleadings).

But not to a pleading superseded by amendment and not in evidence.

Payne *vs.* Kings Co. Mfg. Co., 2 *Hun*, 673.

[2]See Division XI. of this Brief.

16. *Stating what is not in evidence,—aspersions.*—If counsel states as facts matters which are not in evidence,[1] or uses language calculated to humiliate and degrade the adverse party without foundation in the evidence, or language calculated to arouse prejudice in the jury irrelevant to the case,[2] the adverse party may interpose, and if the Court refnses to check the abuse, an exception lies.

[1]Rolfe *vs.* Rumford, 66 *Me.*, 564, and cas. cit.

Hall *vs.* Wolff, 61 *Iowa*, 559; s. c., 16 *Northw. Rep.*, 709.

Brown *vs.* Swineford, 44 *Wisc.*, 282; s. c., 28 *Am. R.*, 582.

Festner *vs.* Omaha & S. W. R. R. Co. (*Nebr.*, 1885), 22 *Northw. Rep.*, 559.

But dates fixed by the records of the Court may be stated to the jury as facts.

Andrews *vs.* Graves, 1 *Dill.*, 108.

Festner *vs.* Omaha & S. W. R. R. Co. (*above*).

Tucker *vs.* Henniker, 41 *N. H.*, 317, 322.

[2]Coble *vs.* Coble, 79 *N. C.*, 589; s. c., 28 *Am. R.*, 338.

Fry *vs.* Bennett, 3 *Bosw.* (*N. Y.*), 200.

17. *Use of document not in evidence.*—It is error to allow counsel to use with the jury documents that have not been put in evidence.

Union Central Life Ins. Co. *vs.* Cheever, 36 *Ohio St.*, 201; s. c., 38 *Am. R.*, 573.
Koelges *vs.* Guardian Life Ins. Co., 57 *N. Y.*, 638 (reading from pamphlet proved to have been issued by defendant).
McKeever *vs.* Weyer, 11 *Weekly Dig.*, 258 (exhibiting cartoon or caricature).

18. *Document not formally read.*—It is not indispensable that a document put in evidence should have been actually read or handed to the jury before closing the evidence. But the Court may allow it to be read during the argument, the adverse party being then allowed to give evidence in rebuttal or explanation, if surprised.[1]

The judge has power to allow a document which proves itself to be produced on the argument, if the omission to do so before is excused, and the adverse party not prejudiced.[2]

[1] Harter *vs.* Seaman, 3 *Blackf.* (*Ind.*), 27.
Binder *vs.* State, 5 *Iowa*, 457.
O'Reilly *vs.* Duffy, 105 *Mass.*, 243.
Carlyon *vs.* Lannan, 4 *Nev.*, 156.
s. p., Clapp *vs.* Wilson, 5 *Den.*, 285 (trial before referees).
Compare as to the right to have it go to the jury in the same way, Duke *vs.* Cahawba Nav. Co., 10 *Ala.*, 82; s. c., 44 *Am. Dec.*, 472.

[2] Bank of Charleston *vs.* Emeric, 2 *Sandf.*, 718.

19. *Misuse of evidence.*—Evidence admitted for a specific purpose counsel cannot use for a purpose for which it would have been inadmissible.

Coleman *vs.* People, 55 *N. Y.*, 81, 88.
Dilleber *vs.* Home Life Ins. Co., 10 *Weekly Dig.*, 180.
Cole *vs.* Cole, 5 *id.*, 453.

20. *Nonsuited cause of action.*—If plaintiff is nonsuited as to one of several causes of action he cannot use evidence, which was directly relevant only to the nonsuited cause of action, in support of the other.

Meyer *vs.* Cullen, 54 *N. Y.*, 392.

21. *Reading medical and other scientific books.*—It is error to allow counsel in addressing the jury to read statements from a book of inductive science,[1] unless what is so read has been received in evidence.

It is not enough that the book has been shown by expert testimony to be a standard work.[2]

[1]Washburn *vs.* Cuddihy, 8 *Gray (Mass.)*, 430.
Yoe *vs.* People, 49 *Ill.*, 410.
People *vs.* Wheeler, 9 *Pac. Coast L. J.*, 581; s. c., 14 *Rep.*, 111.
Boyle *vs.* State of Wisconsin, 57 *Wisc.*, 472; s. c., 15 *Northw. Rep.*, 827, and cas. cit.
For other cases see 59 *Am. Dec.*, 180, note.

There is an exception where counsel avoids reading statements of fact, and confines himself to borrowing argument which he might properly have used if it had originated with himself.
Mr. Moak's art., in 24 *Alb. L. J.*, 266 (sound though questioned in *id.*, 284).

"Reason is neither more nor less than reason, because it happens to be read from a book."
Hovey, J. Cory *vs.* Silcox, 6 *Ind.*, 39, 40.
s. p., Legg *vs.* Drake, 1 *Ohio St.*, 286; approved in 36 *id.*, 201, s. c., 38 *Am. R.*, 573.

[2]Stilling *vs.* Town of Thorp, 54 *Wisc.*, 528; s. c., 41 *Am. R.*, 60.

22. *Reading previous proceedings in the cause.*—Counsel has not a right to read to the jury previous proceedings in the same cause,[1] except that he may quote the opinion of an appellate Court on a question of law, only as matter of argument.[2]

[1]Bell *vs.* McMaster, 29 *Hun*, 272.
Baker *vs.* City of Madison (*Wisc.*, 1885), 22 *Northw. Rep.*, 141.

Butler *vs.* Slane, 50 *Penn. St.*, 456, 459 (error to allow charge on former trial to be read).
Allaire *vs.* Allaire, 39 *N. J. L.*, 113 (but error to allow opinion of appellate Court as to weight or credibility of evidence to be read).
Crawford *vs.* Morris, 5 Gratt., 90, 104 (error to allow opinion as to admissibility of evidence to be read).
Good *vs.* Mylin, 13 *Penn. St.*, 538.
For the *Georgia* rule under statute see Douglass *vs.* Boynton, 59 *Geo.*, 283, 285.

[2] Allaire *vs.* Allaire, 39 *N. J. L.*, 113, 114.

"Plainly counsel, in his address to the jury, can, for the purpose of presenting his views of the law of his case, call to his aid and quote the language delivered from the bench" (per BEASLEY, C. J., *ib.*).

In State *vs.* Hoyt, 46 *Conn.*, 333, 338; s. c., 38 *Am. R.*, 580, reading the whole opinion was sanctioned in a criminal case where the facts seemed necessary to understand the law, and the jury are judges of law and fact.

S. P., Noble *vs.* McClintock, 6 *Serg. & R.*, 58; explained in 13 *Penn. St.*, 538.

23. *Stating or reading the law.*—Counsel has the right to state his views of the law to the jury by way of argument of the questions of fact to be submitted to them, except that he is not entitled to argue against any ruling already made upon the trial, and provided that it be understood that the jury are to take the law from the instructions of the judge, and not from counsel.[1]

Allowing counsel against objection to go beyond this limit in reading from law books is error.[2]

[1] Rex *vs.* Courvoisier, 9 *Carr. & P.*, 362.
And see Allaire *vs.* Allaire, 39 *N. J. L.*, 113, 114.
[*Contra* in *Illinois*, City of Chicago *vs.* McGiven, 78 *Ill.*, 347, 350 (holding it error to allow the reading of decisions to the jury)].

[2] Porter *vs.* Choen, 60 *Ind.*, 338.
State *vs.* Klinger, 46 *Mo.*, 224.
Gilberson *vs.* Miller Mining, etc., Co. (*Utah*, 1885), 5 *Pac. Rep.*, 699.

24. *Interrupting for correction.*—Counsel has a right to interpose, during the argument of adverse counsel, to object to his mis-stating the evidence or transcending the limits of argument.

Long *vs.* State, 12 *Geo.*, 293, 330.

But not to his assuming, as proved, that as to which there is a conflict of testimony.
Hatcher *vs.* State, 18 *Geo.*, 460 (criminal case).

25. *Judge may interpose.*—It is proper for the Court, of its own motion, to interpose in restraint of counsel transgressing these rules.

Melvin *vs.* Easeley, 1 *Jones* (*Nor. Car.*), 386, 388.
Tucker *vs.* Henniker, 41 *N. H.*, 317, 323.
St. Louis & S. E. R. R. Co. *vs.* Myrtle, 51 *Ind.*, 566, 577, and cas. cit.

26. *Recalling witness or re-reading document.*—The judge may recall a witness during the summing up, when a question is made as to what his testimony was, or if the witness is not at hand, may refer to the notes of the judge or of the stenographer.[1]

It is not error to refuse delay for the purpose of finding a document which has been mislaid.[2]

[1] Long *vs.* State, 12 *Geo.*, 293.

So held where the judge's notes were kept pursuant to direction of statute.

[2] McLendon *vs.* Frost, 57 *id.*, 448, 459.

27. *Amending.*—Under a statute permitting pleadings to be amended "on" the trial, an amendment may be allowed during the argument. On the trial means before the close of it.

Franklin Fire Ins. Co. *vs.* Findlay, 6 *Whart.*, 483; s. c., 37 *Am. Dec.*, 430.

28. *Re-opening.*—The judge has power in his discretion to allow the case to be re-opened and further evidence taken, even after argument closed.[1] But the adverse party should be allowed to rebut it.[2]

[1] George *vs.* Pilcher, 28 *Gratt.* (*Va.*), 299, 310, and cas. cit.
Darland *vs.* Rosencrans, 56 *Iowa*, 122.
Commissioners *vs.* Slatter, 52 *Ind.*, 171 (argument closed, except plaintiff's).

[2] George *vs.* Pilcher, 28 *Gratt.* (*Va.*), 299.

XVII.—THE INSTRUCTIONS.

[The statutes existing in many of the states restraining the judge's instructions, are so diverse and so diversely construed, and so well understood each in their own locality, that I have not thought it best to take the necessary space to state them; and I have been confirmed in this by the impression that they chiefly are due to causes that may not be generally permanent, and will be likely to give way in course of time.

In respect to "Special verdicts" and "Special questions," the reader will find much confusion in the language of the reports, answers to special questions being often called special verdicts. As the two proceedings are entirely distinct (although putting special questions is a convenient substitute for asking a special verdict), it may be useful here to make clear my use of these expressions. A special verdict, properly so-called, is a finding of facts, with conclusion in the alternative, that if upon these facts the law is for plaintiff, the jury find for plaintiff, if upon these facts it is for defendant, the jury find for defendant. The jury have, in certain cases, a right to find thus specially on all or any of the issues, and this enables them sometimes to agree in appearance and be discharged, while, in reality, disagreeing, those in favor of an absolute verdict one way being content to accompany it with a special verdict which those opposed to the general verdict think will vindicate their view.

The putting of special questions is an analogous mode of requiring the jury to find on any facts in issue; and though it may have a similar effect it has great advantage in defining the pivotal facts so as to enable the court to apply the law with more justice than a general verdict would.

The finding of the jury in either case is, in a general sense, a "*special*" verdict; but it is more convenient for clearness in stating the rules here, to confine the term special verdict to what was known as such at common law; and to designate answers given under the more modern method of putting questions, as "special findings."]

A. General Rules.

1. Power of Court.
2. State Statutes in United States Courts.
3. Right of request.
4. Complex request.
5. Amended or substituted requests.
6. Requiring written request, — time.
7. Right of counsel to see.

B. Instructions as to Pleadings and Evidence.

8. Pleadings.
9. Separate defenses.
10. Superfluous allegation.
11. Burden of proof.
12. Presumption of law.
13. Presumption of fact.
14. Specific fact.
15. Instructions as to the evidence: — no evidence.
16. — disregarding evidence.
17. Sufficiency of evidence.
18. Result of testimony.
19. Circumstantial evidence.
20. Alternative propositions.
21. Misuse of evidence.
22. Affirmative and negative testimony.
23. Testimony of party, when his only evidence.
24. — when contradicted by himself.
25. Conflict between adverse parties' testimony.
26. Omission to call a witness.
27. Refusal to produce document.
28. Cumulative evidence.
29. Unimpeached and uncontradicted testimony.
30. Impeached testimony.
31. *Falsus in uno.*
32. Incredible fact.
33. Expressing opinion on weight.
34. — —
35. Construction and effect of writing.
36. Requisite cogency of evidence.
37. — as to crime.
38. Doubtful rule of law.

C. Instructions Relating to Effect of Verdict.

39. Interest on actual damages.
40. Double or treble damages.
41. Informing jury as to effect of verdict, — on costs, — on imprisonment.

D. Further Requests, and Exceptions.

42. Further instructions.
43. Exception to charge.
44. — to variance from request.
45. When to be taken.

E. Special Verdict.

46. Right of jury to render special verdict.
47. Power of judge to require it.
48. Parties may draft the special verdict.
49. Right of jury to frame their own.

F. Special Questions.

50. Power to put special questions.
51. — when to be put.
52. Nature and form of questions.
53. — inspection and objection.
54. Withdrawing.

G. Sealed Verdict.

55. Power of court.

A. GENERAL RULES.

1. *Power of Court.*—In the absence of statute to the contrary the judge has power to instruct the jury *sua sponte;* but it is in his discretion whether to do so or not, if neither party request it.

Pennock *vs.* Dialogue, 2 *Pet.*, 1, 15; aff'g 4 *Wash.*, 538.
Haupt *vs.* Pohlman, 16 *Abb. Pr.*, 301, 307; s. c., 1 *Robb.*, 121.

2. *State statutes in United States Courts.*—State laws prescribing the manner in which the judge shall discharge his duty in charging the jury, or the papers which he will permit to go to them in their retirement, or the requiring the jury to answer special interrogatories in addition to their general verdict, do not apply to the Courts of the United States.

Indianapolis & St. Louis R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291.
Nudd *vs.* Burrows, 91 *U. S.* (1 *Otto*), 426.
U. S. *vs.* Train, 12 *Fed. Rep.*, 852.

For these regulations the local statutes should be consulted.

In the absence of any regulation requiring it, the judge's instructions need not be reduced to writing, except to the extent necessary for enabling counsel to except.
Smith *vs.* Crichton, 33 *Md.*, 103, 108.

3. *Right of request.*—A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of the evidence, and have the instruction of the Court given to the jury thereon; and it is error to refuse to listen to a timely request so to do.

Chapman *vs.* McCormick, 86 *N. Y.*, 479.

4. *Complex request.*—When instructions are asked in the aggregate, or a series of propositions are presented

as one request, the whole may properly be rejected by the Court if there is anything exceptionable in either of them.

Indianapolis, etc., R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291, and cas. cit.
Caldwell *vs.* Murphy, 11 *N. Y.*, 416.

5. *Amended or substituted requests.*—After unreasonable requests have been rejected, it may still be error to refuse to listen to specific requests which would have been proper if made alone in the first instance.

DeBost *vs.* Albert Palmer Co., 35 *Hun*, 386.

6. *Requiring written request, — time.*—The Court have power to require that instructions asked for must be presented before argument made to the jury,[1] and in writing.[2]

But, notwithstanding such a limit of time, counsel acting in good faith has a right, after the judge has instructed the jury and before they have retired, to request him to correct an error or supply a deficiency.[3]

[1] Manhattan Life Ins. Co. *vs.* Francisco, 17 *Wall.*, 672, 678.
Ela *vs.* Cockshott, 119 *Mass*, 416, 418.

[2] Manhattan Life Ins. Co. *vs.* Francisco, (*above*).

Good practice requires that counsel desiring to request instructions, should present their requests to the judge in separate and distinct propositions, fairly and legibly written, before the judge begins his charge.
If the presentation of requests is delayed until after the judge has charged the jury, he may not unreasonably require them to be presented orally, or by reading them, he responding to each as read, or he may, in his discretion, require them to be first submitted to the adverse counsel, and then charge those that are consented to and determine whether or not to charge those that are not consented to.

[3] Crippen *vs.* Hope, 38 *Mich.*, 344.
s. p., Chapman *vs.* McCormick, 86 *N. Y.*, 479.

See also paragraph 40, *below.*

7. *Right of counsel to see.*—Counsel has a right to see or hear his requests to charge which are presented by adversary.

This right is essential to secure a fair trial, both because no communication in the course of the trial should be received by the judge from either side in exclusion of the other, and because the omission to comply with a proper request of the adversary is not unfrequently fatal to a just and otherwise regular verdict.

The right stated in the text is recognized by
Tinkham *vs.* Thomas, 34 *Super. Ct.* (*J. & S.*), 237.

B. INSTRUCTIONS AS TO PLEADINGS AND EVIDENCE.

8. *Pleadings.*—The Court should not refer the jury to the pleadings for information as to what the issues are.

Bryan *vs.* Chicago, R. I., etc., R. R. Co., 63 *Iowa*, 464; s. c., 19 *Northw. Rep.*, 295.

Hollis *vs.* State Ins. Co. (*Iowa*, 1884), 21 *Northw. Rep.*, 774.

9. *Separate defenses.*—If a defense in abatement is joined in the same answer with a defense in bar, the plaintiff may require that the jury be instructed to render separate verdicts.

Gardner *vs.* Clark, 21 *N. Y.*, 399, 401.

10. *Superfluous allegation.*—A plaintiff is entitled to go to the jury on a cause of action on contract substantially alleged and supported by evidence, notwithstanding a failure to prove commingled allegations of tort.

Graves *vs.* Waite, 59 *N. Y.*, 156.

[*Contra*, under the *N. Y. Code Civ. Pro.*, § 549, *subd.* 4, when the tort is a fraud in contracting or incurring the liability, such as constitutes a ground of arrest.]

11. *Burden of proof.*—It is error to instruct the jury that plaintiff, by giving evidence of a *prima facie* case, has shifted the burden of proof to defendant.[1]

But if plaintiff has given evidence such as to raise a legal presumption of the existence of the fact alleged, it is not error for the Court to instruct the jury that, in weighing the whole evidence together, they may consider that the plaintiff has given *prima facie* evidence in support of his case and such as is conclusive if uncontradicted, and that this must be contradicted or disproved by a preponderance of evidence on the part of defendant, or the plaintiff is entitled to recover.[2]

[1] Heinemann *vs.* Heard, 62 *N. Y.*, 448, 455; rev'g 2 *Hun*, 324; s. c., 4 *Supm. Ct.* (*T. & C.*), 666.

[2] Crane *vs.* Morris, 6 *Pet.*, 598, 620.
Kelly *vs.* Jackson, *Id.*, 622, 631.
Heilman *vs.* Lazarus, 12 *Abb. N. C.*, 19; s. c., less fully, 90 *N. Y.*, 672; in full, 65 *How. Pr.*, 95.
This rule does not apply when that which is claimed to be a *prima facie* case rests on testimony which raises a question of credibility of witnesses for the jury.

12. *Presumption of law.*—It is error to refuse to state to the jury what is the presumption of law on a material point in the absence of proof, though the adverse party has already introduced evidence sufficient to sustain a verdict contrary to such presumption, if such evidence be not sufficient to require the jury to find contrary to the presumption.

Potter *vs.* Chadsey, 16 *Abb. Pr.*, 146.
A statute prohibiting a judge from charging on a matter of fact, does not forbid his instructing them that a presumption arising in the case is entitled to great weight.
Durant *vs.* Burt, 98 *Mass.*, 161.
But instructions as to presumptions should be so framed as not to confuse or mislead the jury by neglecting to discriminate between disputable and indisputable presumptions, nor to give them as a presumption, without qualification, that which only justifies an inference either way, that is to say, which is only a presumption of fact.

13. *Presumption of fact.*—In a State in which it is the practice of the State Courts to indicate the opinion of the judge as to what inferences are fairly deducible from the testimony, it is proper for Courts of the United States to do the same.

Mitchell *vs.* Harmony, 13 *How.* (*U. S.*), 115, 130.

14. *Specific fact.*—A peremptory instruction to the jury is not erroneous if the evidence respecting it is of such a conclusive character as would compel the Court, in the exercise of a sound legal discretion, to set aside a verdict in opposition to such evidence,[1] but after the judge has made a full and fair charge, he is not bound, though requested by counsel, to instruct them for which party to find, if they find one way or the other as to particular facts in the case.[2]

[1] Montclair *vs.* Dana, 107 *U. S.* (17 *Otto*), 162.

[2] Rexter *vs.* Starin, 73 *N. Y.*, 601.

15. *Instructions as to the evidence:—no evidence.*—It is the duty of the Court to inform the jury, if requested, when there is no evidence of a material fact,[1] unless the complexity of oral evidence renders it more proper to instruct them hypothetically.[2]

[1] Storey *vs.* Brennan, 15 *N. Y.*, 524.

But the slightest evidence from which the jury may properly infer the fact is enough to preclude such instruction.

Bond *vs.* Warren, 8 Jones (*Nor. Car.*) *L.*, 192.

[2] Knox *vs.* Fair, 17 *Ala.*, 503.

16. — *disregarding evidence.*—The Court may instruct the jury to disregard evidence wrongly admitted, although it was admitted without objection and has not been struck out.[1]

But a party cannot ask such an instruction, as matter of right, who did not object as soon as the ground of objection was known to him.[2]

[1]Pennsylvania Co. *vs.* Roy, 102 *U. S.* (12 *Otto*), 451, 458.
People *vs.* Parish, 4 *Den.*, 153.
s. p., Morton *vs.* Beall, 2 *Har. & G.* (*Md.*), 136.
[*Contra*, Becker *vs.* Becker, 45 *Iowa*, 239 (on the ground that omitting to object led the other party to rely on its going to the jury, instead of supplying better evidence).]
Whether instructions will cure the error is another question.

[2]Edge *vs.* Keith, 21 *Miss.* (13 *S. & M.*), 295.
Ganson *vs.* Tifft, 71 *N. Y.*, 48, 56.
Rees *vs.* Livingston, 41 *Penn. St.*, 113.
McInroy *vs.* Dwyer, 47 *id.*, 118.
Harrison *vs.* Young, 9 *Geo.*, 359, 366.
[*Contra*, Hamilton *vs.* N. Y. Central, etc., R. R. Co., 51 *N. Y.*, 100, 106; Barnett *vs.* St. Anthony Falls, etc., Co. (*Minn.*, 1885), 22 *Northw. Rep.*, 535, 538.]
This rule, which I state thus in deference to recent authority, leaves it in the discretion of the judge whether to instruct the jury to disregard or not. If this be sound, the discretion should be controlled by the following distinction; If the objection goes to the means of evidence or the manner of proof,—as for instance, the competency of a witness, or of oral in lieu of written evidence, or the authentication of a document, or to remoteness in point of time or place, on a question of value,—the omission to object or move to strike out should generally be deemed a waiver, giving the adversary, who might have supplied the defect on timely objection, a right to have the evidence go to the jury. But if the objection goes to the substantial relevancy of the fact proved, that is to say, its intrinsic capacity to afford any fair ground of an inference affecting the issue, it ought not to be deemed waived.

17. *Sufficiency of evidence.*—It is error to tell the jury, without qualification, that the evidence raises a presumption of a particular fact, or is sufficient to justify finding a particular fact, if it raises not a presumption of law, but only a presumption of fact on which they might find either way.

Stone *vs.* Geyser, 52 *Cal.*, 315.
Allison *vs.* State, 42 *Ind.*, 354, 357.
s. p., Read *vs.* Hurd, 7 *Wend.*, 408.

18. *Result of testimony.*—It is not error to refuse to instruct the jury that if they believe a specified witness, they should find for the party for whom he testified.

Chapman *vs.* Erie R. R. Co., 55 *N. Y.*, 579; rev'g 1 *Supm. Ct.* (*T. & C.*), 526.
Dolan *vs.* Delaware, etc., Canal Co., 71 *N. Y.*, 285.
Bailey *vs.* Bailey, 97 *Mass.*, 373.

But it is not necessarily error to instruct them that the testimony of a witness, if believed, establishes a fact, if the testimony is clear, and they are given to understand they may believe or not.
Russell *vs.* Ely, 2 *Black*, 575.
S. P., where the conflicting witnesses were the parties, Bellew *vs.* Ahsburg, 23 *Kans.*, 287.

19. *Circumstantial evidence.*—Where the circumstances together are sufficient to sustain the finding of a fact, the adverse party has no right to require that the jury be instructed that separately not one of them is sufficient.

Scott *vs.* Lloyd, 9 *Pet.*, 418, 460.
Keenan *vs.* Hayden, 39 *Wisc.*, 558, 561.

20. *Alternative propositions.*—A party is entitled to have specific charges upon the law applicable to each of the various hypotheses or combinations of facts which the jury from the evidence might legitimately find, and which have not been covered by other instructions.

Sword *vs.* Keith, 31 *Mich.*, 247, 255.
Foster *vs.* People, 50 *N. Y.*, 598 (criminal case).

21. *Misuse of evidence.*—A party has a right to have the jury instructed that evidence admitted only for a specific purpose cannot be regarded by them for another purpose for which it was incompetent.

Henson *vs.* King, 2 *Jones* (*Nor. Car.*), L., 385.
S. P., Williams *vs.* Mech. & Trav. Fire Ins. Co., 54 *N. Y.*, 577.
Weir *vs.* McGee, 25 *Tex. Supp.*, 20, and see p. 138 of this Brief, paragraph 19.

22. *Affirmative and negative testimony.*—It is not error to instruct the jury in an appropriate case that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

Stitt *vs.* Huidekopers, 17 *Wall.*, 384, 394.

23. *Testimony of party, when his only evidence.*—Where the only evidence of a party is his testimony in his own behalf, it is error to instruct the jury that if not improbable nor discredited they must find for him.

Lesser *vs.* Wunder, 9 *Daly*, 70.
s. p., p. 127 of this Brief, paragraph 17.

The well-established rule, followed by the English Court of Chancery, that no one can, on his own testimony (Whittaker *vs.* Whittaker, 21 *Law Reports* [*Chan. Div.*], 657; s. c., 30 *Weekly Rep.*, 787), unsupported by corroborative evidence, sustain a claim against the estate of a deceased person,—may be satisfied by corroborative evidence of the acts of the parties and by their documents.

Young *vs.* Wallingford [*Chan. Div.*, May, 1883], 48 *L. T. R., N. S.*, 756.

24. — *when contradicted by himself.*—A party's testimony in his own behalf is entitled to no consideration if it is flatly contradicted by his own previous writings.

Boyd *vs.* Colt, 20 *How. Pr.*, 384.

It was held in Juinata Building Assoc. *vs.* Hetzel, 103 *Penn. St.*, 507, that in an equity case the uncorroborated testimony of a party impeaching his own written testimony, or varying its effect, is not sufficient to go to the jury.

Lynch *vs.* Pyne, 24 *Super. Ct.* (*J. & S.*), 11.

25. *Conflict between adverse parties' testimony.*—Where the evidence is the conflicting testimony of plain-

tiff and defendant, each in his own behalf, it is error to instruct the jury that to the extent of the conflict, the party having the burden of proof must fail.

Kuehn *vs.* Wilson, 13 *Wisc.*, 104, 109.
Salter *vs.* Glenn, 42 *Geo.*, 64, 82.
S. P., p. 127 of this Brief, paragraph

26. *Omission to call a witness.*—The mere omission to call a competent and available witness who has some knowledge of the transactions, which if the claim of the party omitting is correct would be favorable, and who is not adversely interested or biassed, is a circumstance which the jury may consider;[1] but it is error to instruct them, even when such witness is a party on the same side, that they may infer that his testimony, if he were produced, would be favorable to the other party.[2]

[1] Reynolds *vs.* Sweetser, 15 *Gray*, 78, 79.
Bleecker *vs.* Johnston, 69 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

It is error to instruct the jury that a party is bound to call a particular witness who seems to be able to explain evidence against him, if such witness is interested against the party.
Coykendall *vs.* Eaton, 42 *How. Pr.*, 378.

[2] Bleecker *vs.* Johnston, 69 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

There is much conflict of opinion on the question whether the judge may comment on the absence of supposed testimony or documents. Compare
Nicol *vs.* Crittenden, 55 *Geo.*, 497.
Lowe *vs.* Massey, 62 *Ill.*, 47.
Moore *vs.* Wright, 90 *id.*, 470.
Brooks *vs.* Steen, 6 *Hun*, 516.
Steininger *vs.* Hoch, 42 *Penn. St.*, 432.
Miller *vs.* Dayton, 57 *Iowa*, 423.
Frick *vs.* Barbour, 64 *Penn. St.*, 120.
American Underwriters' Assoc. *vs.* George, 97 *id.*, 238.
Seward *vs.* Garlin, 33 *Vt.*, 583.
Clough *vs.* Patrick, 37 *id.*, 421.
Daub *vs.* N. P. R. Co. (*U. S. Circ. Ct., Oreg.*), 18 *Fed. Rep.*, 625.

27. *Refusal to produce document.*—A party who refuses on request to produce a document shown to be within his control, thereby raises a presumption that if produced it would have tended to support the evidence which the other party, in the absence of the document, is compelled to rely upon.

Clifton *vs.* U. S., 4 *How.* (*U. S.*), 242 (holding the rule to apply even where there is no question of best and secondary).

Wylde *vs.* Northern R. R. of N. J., 14 *Abb. Pr., N. S.*, 213; s. c., 53 *N. Y.*, 156.

28. *Cumulative evidence.*—If a party has called one witness his neglect to call another to the same point, though a circumstance to be considered in weighing the evidence that is actually adduced, cannot be given to the jury as a ground for inferring that the testimony of the other might be prejudicial.

Bleecker *vs.* Johnston, 59 *N. Y.*, 509; rev'g 51 *How. Pr.*, 380.

29. *Unimpeached and uncontradicted testimony.*—The general rule that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the jury,—does not apply to the testimony of an interested witness, nor to one whose testimony is intrinsically improbable, or contradicted by circumstances;[1] nor to testimony to a matter of common opinion on facts that are before the jury.[2]

[1] Koehler *vs.* Adler, 78 *N. Y.*, 287.

[2] See Division XV. of this Brief, paragraph 22*a*.

30. *Impeached testimony.*—The testimony of a witness who has been impeached should go to the jury, not with an instruction to disregard it wholly, but to be weighed in connection with the other evidence.[1]

Whether a witness has been successfully impeached or not is a question for the jury.[2]

[1] White *vs.* McLean, 57 *N. Y.*, 670.
Dunn *vs.* People, 29 *id.*, 523.

[2] Allis *vs.* Leonard, 58 *N. Y.*, 288.

31. *Falsus in uno.*—Where a witness testifying to matters material to the issues, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge the jury that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him.[1]

But a party is not entitled to have the jury so instructed unless his falsehood is shown to be willful; but the judge should only caution the jury.[2]

[1] Roth *vs.* Wells, 29 *N. Y.*, 471; aff'g 41 *Barb.*, 194.
S. P., People *vs.* Evans, 40 *N. Y.*, 1.

[2] Pease *vs.* Smith, 61 *N. Y.*, 477; aff'g 5 *Lans.*, 519.
Koehucke *vs.* Ross, 16 *Abb. Pr., N. S.*, 345, with note.

32. *Incredible fact.*—Testimony to an intrinsically improbable fact may be disbelieved by the jury, although the witness was uncontradicted and unimpeached.

Stillwell *vs.* Carpenter, 2 *Abb. N. C.*, 238 (testimony to good faith).
Stafford *vs.* Leamy, 34 *N. Y. Super. Ct.* (*J. & S.*), 269, and cas. cit.
Tracy *vs.* Town of Phelps (*U. S. Circ. Ct., N. D. N. Y.*, 1885), 1 *Kans. L. J.*, 38.

33. *Expressing opinion on weight.*—In a State in which the course of practice adopted by the State Courts does not forbid the presiding judge to express his opin-

ion upon questions of fact, to the jury, a judge of a United States Court may do so.

Mitchell *vs.* Harmony, 13 *How.* (*U. S.*), 115.

The rule for those jurisdictions has been well stated thus: Where the judge intends, in commenting on facts, merely to indicate an opinion on a question which he leaves to the jury, the proper form of charge is to tell the jury that the cause of action or defense, as the case may be, rests upon a question which the judge specifies, and that it is for them to judge from the evidence whether the fact be one way or the other, and if they should be of the opinion one way they must find for the defendants, and if they thought otherwise, they must find for the plaintiffs.

If then, the judge deems proper to give his opinion on the fact, for the assistance or satisfaction of the jury, he may do so with utility and safety.*

But if he tells the jury that the matters given in evidence are conclusive on the one side, and the matters given in evidence on the other are not sufficient, and that if the jury agree with him in opinion they ought to find so and so, without more, it is error.

Firemen's Ins. Co. *vs.* Walden, 12 *Johns.*, 513; s. c., 7 *Am. Dec.*, 340.

s. p., Gordon *vs.* Little, 8 *Serg. & R.*, 533; s. c., 11 *Am. Dec.*, 632.

Allis *vs.* Leonard, 58 *N. Y.*, 288.

Massoth *vs.* Delaware & H. C. Co., 64 *id.*, 524, 533.

[**Contra*, Vedder *vs.* Fellows, 20 *N. Y.*, 126, 130].

34. — —. It is not error to refuse to express an opinion on the sufficiency of evidence, if the evidence is not sufficient to warrant a peremptory ruling in favor of the party relying on it.

Moore *vs.* Meacham, 10 *N. Y.*, 207.

35. *Construction and effect of writing.*—The construction and effect of writings, if the question arises only from the writings themselves, is for the Court.[1] If it depends in part on oral evidence, the question is for the jury.[2]

If the extrinsic facts are ambiguous, the jury should be told what would be the proper construction upon the several different states of facts they might find.[3]

[1]Stokes *vs.* Johnson, 57 *N. Y.*, 673.
Goddard *vs.* Foster, 17 *Wall.*, 123.

[2]Etting *vs.* Bank of U. S., 11 *Wheat.*, 59, 76.
Barreda *vs.* Silsbee, 21 *How.* (*U. S.*), 146.
First National Bank *vs.* Dana, 79 *N. Y.*, 108, 116.
Goddard *vs.* Foster, 17 *Wall.*, 123.

[3]Curtis *vs.* Martz, 14 *Mich.*, 506.

36. *Requisite cogency of evidence.*—On a jury trial of a civil issue, the issue must be determined by a preponderance of evidence;[1] and it is error to instruct the jury that the evidence must be clear, satisfactory and conclusive, although the question be one which, if tried in equity, would require that degree of proof.[2]

[1]Various substitutes for "preponderance of evidence," such as "weight of evidence," "balance of probabilities" or telling the jury they must be "satisfied," etc., have been held error in some cases, though sanctioned as harmless in others.

[2]Holt *vs.* Brown, 63 *Iowa*, 319; s. c., 19 *Northw. Rep.*, 235.
[*Contra*, Brawdy *vs.* Brawdy, 7 *Penn St.*, 157.
Juinata Building Assoc. *vs.* Hetzel, 103 *Penn. St.*, 507.]

Which of these rulings is sound is too broad a question for discussion here. I state the rule as in the text in deference to what I understand to be the general practice in New York; but it is a question of radical importance under the new procedure which merges cases of law and equity, and it seems to have escaped adequate consideration in reported cases.

In Piersol *vs.* Neill, 63 *Penn. St.*, 420, 426, the Pennsylvania rule was thus stated: "If in the opinion of the former [the judge] the facts are not such as should move a chancellor to decree specific execution of the contract, he should give a binding instruction to that effect to the jury, and withdraw the case from them: if the case should be sufficient on the testimony, then the jury should be so instructed, and the testimony referred to them to find whether it be true or not."

37. — *as to crime.*—An allegation of a criminal act, when made in a civil action tried before a jury, is proved by a preponderance of evidence, weighed with the presumption of innocence; it is error to instruct the jury that it must be proved beyond a reasonable doubt.

This is the better opinion.
See *Abb. Tr. Ev.*, 495, where the conflicting cases are classified.
N. Y. Guaranty, etc., Co. *vs.* Gleason, 7 *Abb. N. C.*, 334, 352, and note at p. 357; s. c., 78 *N. Y.*, 503.
Johnson *vs.* Agricultural Ins. Co., 25 *Hun*, 251 (followed in 95 *N. Y.*, 562.
To the contrary, *Stephens Dig.*, *Art.* 94, and cases cited in authorities above mentioned.

38. *Doubtful rule of law.*—Where the case turns upon a doubtful question of law, the judge may let it go to the jury under instructions in accordance with apparent authority, so as to settle the question of fact and then grant an order for new trial, on appeal from which the question can be reviewed.

Dickenson *vs.* Edwards, 2 *Abb. N. C.*, 300.

C. Instructions Relating to Effect of Verdict.

39. *Interest on actual damages.*—In actions of tort, the judge may leave it to the jury whether to allow interest upon the damages, or not, but should not instruct them to allow it.

Walrath *vs.* Redfield, 18 *N. Y.*, 457.
Black *vs.* Camden & Amboy R. R. Co., 45 *Barb.*, 40.

40. *Double or treble damages.*—Where the law gives double, treble or other increased damages, the verdict should find single damages as such, unless otherwise

directed by the statute, and the Court will direct judgment thereon at the increased rate.

Newcombe *vs.* Butterfield, 8 *Johns.*, 342.
King *vs.* Havens, 25 *Wend.*, 420.
Warren *vs.* Doolittle, 5 *Cow.*, 678.
N. Y. Code Civ. Pro., § 1184.

41. *Informing jury as to effect of verdict, — on costs, — on imprisonment.*—The judge may, in his discretion, inform the jury what will be the effect of a verdict, in respect to carrying costs,[1] or to justifying execution against the person;[2] but it is not error to refuse to do so.[3]

[1] Waffle *vs.* Dillenback, 38 *N. Y.*, 53; s. c., more fully, 4 *Abb. Pr., N. S.*, 457; aff'g 39 *Barb.*, 123.
Nolton *vs.* Moses, 3 *Barb.*, 31.

[2] Keller *vs.* Strasburger, 90 *N. Y.*, 379; aff'g 23 *Hun*, 625.

[3] *Id.*

D. FURTHER REQUESTS, AND EXCEPTIONS.

42. *Further instructions.*—It is error for the judge to refuse to listen to requests for further instructions on specific points, merely because he has already instructed the jury[1]; but when the charge already given covers the entire case, and submits it properly to the jury, the Court may refuse to give further instructions.[2]

[1] Paragraph 5, above.
Pfeffele *vs.* Second Ave. R. R. Co., 34 *Hun*, 497, and cas. cit.

[2] Indianapolis, etc., R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291.
Holbrook *vs.* Utica, etc., R. R. Co., 12 *N. Y.*, 236.
Rexter *vs.* Starin, 73 *N. Y.*, 601.

43. *Exception to charge.*—An exception to the entire charge, or to a series of propositions in it, in gross, does

not require attention, if any portion of what is excepted to is sound.

Beaver *vs.* Taylor, 93 *U. S.* (3 *Otto*), 46.
Jones *vs.* Osgood, 6 *N. Y.*, 233.

44. — *to variance from request.*—An exception does not require attention if it does not indicate the precise point of the supposed error, but leaves it to the judge to compare the requests and the charge to ascertain what modifications are desired.

Beaver *vs.* Taylor, 93 *U. S.* (3 *Otto*), 46.
Ayrault *vs.* Pacific Bank, 47 *N. Y.*, 570, 576.

45. *When to be taken.*—An exception to the charge must be taken before the jury have rendered their verdict. It must, at the time when taken, be reduced to writing by the exceptant, or entered in the minutes.

N. Y. Code Civ. Pro., § 995.
Phelps *vs.* Mayer, 15 *How.* (*U. S.*), 160.

It is a convenient practice to suggest to counsel that the taking of exceptions which do not involve requests for further instructions be postponed until the jury have gone out.

E. Special Verdict.

46. *Right of jury to render special verdict.*—Where the jury have a right to render a special verdict, a refnsal to instruct them that they have such right is error.

Adams & Co's Express *vs.* Pollock, 12 *Ohio St.*, 618.

By the New York Statute the jury have this right, in any action to recover a sum of money only, or real property, or a chattel.
N. Y. Code Civ. Pro., § 1187.

The right to render a special verdict is not necessarily taken away by a statute allowing special questions to be put.
Hendrickson *vs.* Walker, 32 *Mich.*, 68.

47. *Power of judge to require it.*—By the *New York Statute*, in any other action than one for money only, or real property, or a chattel, unless the trial is of issues which have been previously settled for trial by jury, the judge may direct the jury to find a special verdict upon any or all of the issues.

N. Y. Code Civ. Pro., § 1187.

Id. The reference to specific questions of fact, etc., in the statute is to §§ 970, 971, of *N. Y. Code Civ. Pro*

Under such a statute the power is discretionary.

Cleveland, etc., R. R. Co. *vs.* Terry, 8 *Ohio St.*, 570, 586.

According to Peck *vs.* Snyder, 13 *Mich.*, 21, the judge cannot require answers to special questions, unless authorized by statute.

"The correct practice in rendering a special verdict is that the jury find the facts of the case and refer the decision of the cause upon these facts to the Court, with a conditional conclusion, that if the Court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, they find for defendant. By leave of the Court such a verdict may be prepared by the parties, subject to the correction of the Court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the Court for hearing, as in case of a demurrer."

Mumford *vs.* Wardwell, 6 *Wall.*, 423.

See also *Burr. Pr.*, 247; 2 *Tidd's Pr.*, 897; 12 *Ct. of Cl.*, 565.

The power of the Court to give such direction is usually discretionary.

48. *Parties may draft the special verdict.*—It is not the duty of the judge to prepare a draft special verdict to submit to the jury; but where a party has a right to require such a verdict the judge must, if requested in a proper case, give each party adequate opportunity to do so.

Pittsburg, etc., R. R. Co. *vs.* Ruby, 38 *Ind.*, 294, 310.

Hopkins *vs.* Stanley, 43 *id.*, 553, 558 (so holding under a statute giving each party the right to demand a special verdict).

S. P., Miller *vs.* Shackleford, 4 *Dana* (*Ky.*), 264, 271.

49. *Right of jury to frame their own.*—The jury, to whom a draft special verdict is submitted, may modify it, or frame one themselves;[1] and should be instructed that they may do so.[2]

[1]Pittsburg, etc., R. R. Co. *vs.* Ruby, 38 *Ind.*, 294, 310 (*dictum*).
Hopkins *vs.* Stanley, 43 *id.*, 553, 558 (so held even under the Indiana statute, which gives each party the right to demand a special verdict).

[2]Miller *vs.* Shackleford, 4 *Dana* (*Ky.*), 264, 270.

But if their finding is not sufficiently definite the Court may require them to amend it.
Kansas Pac. R. R. Co. *vs.* Pointer, 14 *Kans.*, 37, 51.

F. Special Questions.

50. *Power to put special questions.*—The Court has power, unless otherwise provided by statute, to require a jury on rendering a general verdict to find specially upon any question of fact in the issues submitted to them.[1] So doing is in the discretion of the judge,[2] both in respect to the form and the substance of the questions,[3] unless made matter of right by the statute.[4]

[1]McMasters *vs.* Westchester Mut. Ins. Co., 25 *Wend.*, 379.
Barstow *vs.* Sprague, 40 *N. H.*, 27, 33 (not error to do so against objection).
Dyer *vs.* Greene, 23 *Me.*, 464.
Spaulding *vs.* Robbins, 42 *Vt.*, 90, 93.
[*Contra*, Peck *vs.* Snyder, 13 *Mich.*, 21 (holding it not error to refuse to require it).]

Statutes requiring instructions to be in writing do not necessarily apply to such a direction.
Callister *vs.* Mount, 73 *Ind.*, 559, 567.

[2]This is the rule under the New York statute; same in California.
N. Y. Code Civ. Pro., § 1187.

[3]Hackford *vs.* N. Y. Central, etc., R. R. Co., 53 *N. Y.*, 654.
Forrest *vs.* Forrest, 6 *Duer*, 102; s. c., 3 *Abb. Pr.*, 144.
American Co. *vs.* Bradford, 27 *Cal.*, 360, 365.

Under this statute the judge cannot require it except in connection with a general verdict.
Commissioners *vs.* Kromer, 8 *Ind.*, 446, 449 (under statute making questions a matter of right).

[4]As in several of the Western States.
See Allen *vs.* Davison, 16 *Ind.*, 416.

A State statute making it matter of right does not apply in the Courts of the United States.
Indianapolis & St. Louis R. R. Co. *vs.* Horst, 93 *U. S.* (3 *Otto*), 291.

51. — *when to be put.*—In the absence of special provision, the Court may fix the time for submitting special questions,[1] and may refuse to receive them if unseasonably put.[2]

[1]Even where, as in Indiana, the putting of such questions is matter of right.
Malady *vs.* McEnary, 30 *Ind.*, 273, 277.

[2]*Id.* (holding refusal to receive during charge not error).
Burleson *vs.* Burleson, 28 *Tex.*, 383, 411 (holding refusal to receive further question after jury had returned with their verdict, not error).
Lambert *vs.* McFarland, 7 *Nev.*, 159 (holding refusal to put questions first offered after jury were ready with verdict, not error).

52. *Nature and form of questions.*—The judge should not allow a question to be put to the jury which is not material,[1] nor one which calls for evidence[2] or a conclusion of law.[3]

But it is no objection that a question is leading.[4]

[1]Crane *vs.* Reeder, 25 *Mich.*, 303.
Maxwell *vs.* Boyne, 36 *Ind.*, 120.
Hatfield *vs.* Lockwood, 18 *Iowa*, 296.

[2]Hatfield *vs.* Lockwood (*above*).
Adams *vs.* Louisville & N. R. R. Co. (*Ky.*, 1885), 6 *Ky. L. Rep.*, 687.

[3]Hatfield *vs.* Lockwood, 18 *Iowa*, 296.

[4]Rice *vs.* Rice, 6 *Ind.*, 101.

But it is not error to refuse to put as a question, whether there are any allegations in the complaint which are not true, and if so, what.
Morse *vs.* Morse, 25 *Ind.*, 156.

53. — *inspection and objection.*—The Court have power to require each party to submit his proposed questions to the other.[1]

Objection to a question is too late after it has been answered.[2]

[1]This point seems to have been involved in Malady *vs.* McEnary, 30 *Ind.*, 273, 277; and it is the better opinion that a party has a right to see the questions proposed by his adversary, at any rate unless they are excluded by the judge.

[2]Brooker *vs.* Weber, 41 *Ind.*, 426.

54. *Withdrawing.*—Where the power of the judge to put special questions is discretionary he may, in his discretion, withdraw them before they have been answered.[1]

Where it is matter of right, he cannot withdraw a proper question against objection of the party at whose instance it was regularly put.[2]

[1]Taylor *vs.* Ketchum, 5 *Robt.* (*N. Y.*), 507.
Moss *vs.* Priest, 19 *Abb. Pr.*, 314, 316 (*dictum*).

[2]Otter Creek Block Coal Co. *vs.* Raney, 34 *Ind.*, 329.

It is error to instruct the jury that in the absence of sufficient evidence as to any question, they might so state without further answer to it.
Crane *vs.* Reeder, 25 *Mich.*, 303 (Cooley, J.).
Harriman *vs.* Queen Ins. Co., 49 *Wisc.*, 71 (holding not error to instruct them that where they could not say yes they might say no).
In Maxwell *vs.* Boyne, 36 *Ind.*, 120, it is held that where the evidence is evenly balanced this rule should be applied, but there is a *dictum* that where there is *no* evidence the jury may say they cannot answer.

See Division XX., par. 16, etc., and XX., par. 6.

G. SEALED VERDICT.

55. *Power of the Court.*—The judge may in his discretion, upon consent of the parties, or if no objection be made, authorize the jury to bring in a sealed verdict.

Douglass *vs.* Tousey, 2 *Wend.*, 352; s. c., with note, 20 *Am. Dec.*, 616.
High *vs.* Johnson, 28 *Wisc.*, 72.
Parmlee *vs.* Sloan, 37 *Ind.*, 469.
S. P., Warner *vs.* N. Y. Central, etc., R. R. Co., 52 *N. Y.*, 437, 440; s. c., 11 *Am. R.*, 724.

There is some authority for holding that it is in his discretion to do so even against objection, or without opportunity to make objection; and that this will not be error unless abuse of discretion or some resulting prejudice to the party is shown.

Green *vs.* Bliss, 12 *How. Pr.*, 442 (dictum that judge may without consent).
State *vs.* Engle, 13 *Ohio*, 490 (recommending caution to jurors not to disclose contents nor converse about it till opening).
Evans *vs.* Foss, 49 *N. H.*, 490 (officer by mistake told jury that sealed verdict was directed).
State *vs.* Weber, 22 *Mo.*, 321 (jury volunteered to render sealed verdict).
Lucas *vs.* Marine, 40 *Ind.*, 289 (judge sent direction from hotel in absence of counsel).

XVIII.—DOCUMENTS FOR THE JURY.

1. *General rule as to documents in evidence.*—In the absence of a statute to the contrary,[1] the judge may in his discretion allow documents (except, in most of the states, depositions)[2] which have been admitted in evidence to be taken by the jury when retiring to deliberate upon their verdict,[3] unless objected to because written upon or underscored to call attention to special portions of them.[4]

[1] In Nudd *vs.* Burrows, 91 *U. S.* (1 *Otto*), 426, it was held not error for a judge of the United States Court to refuse to follow a state statute allowing the jury to take out documentary evidence other than depositions.

In *Alabama*,[a] *California*,[b] *Colorado*,[c] *Delaware*,[d] *Illinois*,[e] *Iowa*,[f] *Nevada*,[g] *New Jersey*,[h] *Oregon*,[i] *Minnesota*,[j] and *Texas*,[k] there are statutes which, in general, provide that all papers received in evidence, except depositions, may be taken by the jury when retiring to deliberate upon their verdict. In Alabama, however, the statute provides that depositions may be taken out; and in Iowa a deposition may be taken out if all the evidence is in writing and no part of the deposition has been excluded; but in New Jersey the statute is silent as to depositions. In Colorado, accounts and account books are excepted. In California, Nevada, Colorado, Minnesota and Oregon it is provided that the jury may take out copies of such papers, or of parts of such public documents given in evidence as ought not in the opinion of the Court to be taken from the person having them in possession.

In California, Nevada, Colorado, Minnesota and Oregon it is provided that the jury may take out notes of the testimony taken by themselves or any of them, but none taken by any other person. In Alabama, Illinois and Texas the written instructions to the jury may be taken out; and this is held mandatory in Alabama (*Ala. Code* [1876], § 3109; Miller *vs.* Hampton, 37 *Ala.*, 342).

But in general it seems that these statutes are directory merely, and that it would not be error for the Court in its discretion to refuse to allow the jury to take out any papers.

See the recent case of People *vs.* Cochran, 61 *Cal.*, 548, where that view is taken of the California Statute.

In Maine it is provided that if either party purposely introduces an improper paper among those given to the jury when they retire, the Court may set aside the verdict on motion of the adverse party (*Me. Rev. Stat.* 1871, p. 650, § 79).

[a] *Ala. Code of* 1876, § 3023.
[b] *Cal. Code Civ. Pro.*, § 612.
[c] *Colo. Code Civ. Pro.*, § 169.
[d] *Del. Rev. Code*, p. 649, § 26.
[e] *Ill. Rev. Stat.*, 1880, p. 793, §§ 55, 56.
[f] *Rev. Code, Iowa*, 1880, § 2797.
[g] *Comp. Laws, Nev.*, 1873, § 1230.
[h] *N. J. Rev.*, 1877, p. 876, § 182.
[i] *Gen. Laws, Oreg.*, 1872, p. 146, § 202.
[j] *Gen. Stat., Minn.*, 1883 (*Young's 4th ed.*), p. 743, § 231.
[k] *Rev. Stat., Tex.*, 1879, art. 1303.

[2] *Depositions* are commonly excepted from the general rule, see note 1, *above*. The reason is that the testimony which they contain, if read and re-read by the jury, would otherwise have an unfair advantage over the oral testimony, by speaking to the jury more than once. But where all the evidence is in writing, this is no objection.

Thomp. & M. on Juries, § 385 (1, 2), and cas. cit.
Shomo *vs.* Zeigler, 10 *Phila. (Pa.)*, 611.

In malicious prosecution, the affidavit of the defendant made before the magistrate in instituting the prosecution is not a deposition within the exception.

Seibert *vs.* Price, 5 *Watts & S.*, 438; s. c., 40 *Am. Dec.*, 525.

In New York and, *it seems*, in Ohio, it is within the discretion of the Court to permit the jury to take out a deposition even where the testimony is partly oral.

Howland *vs.* Willetts, 9 *N. Y.*, 170, 175.
Stiles *vs.* McKibben, 2 *Ohio St.*, 588.

[3] Howland *vs.* Willetts, 9 *N. Y.*, 170.
Thomp. & M. on Juries, § 383 (1), and cas. cit.

[*Contra*, in *Indiana.*
Nichols *vs.* State, 65 *Ind.*, 512, 521.
Lotz *vs.* Briggs, 50 *id.*, 346.
Toohy *vs.* Sarbis, 78 *id.*, 474].

Where the genuineness of a document in evidence is disputed it has been held error to allow it to be taken out by the jury to compare the *handwriting* of the body of it with that of the signature.
Matter of Foster, 34 *Mich.*, 21.
Chance *vs.* Indianapolis, etc., R. R. Co., 32 *Ind.*, 472.

Compare, however, State *vs.* Scott, 45 *Mo.*, 302, *contra.*

Papers admitted in evidence for other purposes may be taken to the jury room, it seems, to test handwriting by comparison.
Hardy *vs.* Norton, 66 *Barb.*, 527.

But see Howell *vs.* Hartford Fire Ins. Co. 6 *Biss.*, 163, where reasons are given why the comparison should be made only in open Court, and holding that it is no ground for a new trial to refuse to permit the jury to take out papers for that purpose. In Means *vs.* Means, 7 *Rich. L.*, (*So. Car.*), 533, it is held to be a matter within the discretion of the Court.

A document used for comparison by consent was held not a paper "read in evidence" within the meaning of a statute of Illinois allowing such papers to go to the jury-room, in
Cox *vs.* Straisser, 62 *Ill.*, 383.

As *judicial records* put in evidence must be complete, and as documents offered in evidence must generally go in as a whole, they may be taken to the jury-room, although they contain irrelevant matter, or even contain depositions pertinent to the proceeding wherein taken, but immaterial to the issue on which the jury are to find.
Shomo *vs.* Zeigler, 10 *Phila.* (*Pa.*), 611.

In O'Neall *vs.* Calhoun, 67 *Ill.*, 219, where the record of a former suit was read in evidence by consent, it was held no error to allow it to be taken out by the jury, since it was not a deposition read without consent, nor was it excluded by the Ill. statute.

In Lotz *vs.* Briggs, 50 *Ind.*, 346, 348, it was held error to allow a record of a former suit, admitted in evidence, to be taken out by the jury. Thus applying the rule in that State which excludes all documents from the jury-room (see *above*).

[4] *Thomp. & M. on Juries*, § 383 (5).
Watson *vs.* Walker, 23 *N. H.*, 472, 497.

2. — *used, but not in evidence.*—The judge may also allow documents forming part of the record, or properly used before the jury on the trial,—such as the writ or process and the pleadings,[1] and bills of particulars,[2] and the judge's written instructions,[3]—to be taken out, provided the jury understand that they are not evidence.[4]

Other papers must not be taken out.[5]

[1] *Thomp. & M. on Juries*, § 387, and cases cited.

[2] Rich *vs.* Flanders, 39 *N. H.*, 304.

[3] *Thomp. & M. on Juries*, § 388, citing,—
Hurley *vs.* State, 29 *Ark.*, 17, 29.
State *vs.* Tompkins, 71 *Mo.*, 613.
Wood *vs.* Aldrich, 25 *Wisc.*, 695.

In *Alabama*, a statute providing that written instructions shall "become part of the record and may be taken" out by the jury, is held to be mandatory, and that it is error to refuse to allow the jury to take them to the jury-room when requested by counsel.
Miller *vs.* Hampton, 37 *Ala.*, 342; *Ala. Sel. Cas.* 357.

In *Georgia*, however, it is regarded as an unsafe practice because of the danger of a part and not the whole being read by the jury, and it is held error for the judge to permit the jury to take his written charge to the jury-room against the objection of counsel.
Gholston *vs.* Gholston, 31 *Geo.*, 625.

Written instructions given to the jury at the trial cannot be sent to the jury after they have retired, without consent of the parties.
Smith *vs.* McMillen, 19 *Ind.*, 391.

[4] *Thomp. & M. on Juries*, § 386 (2),
O'Hara *vs.* Richardson, 46 *Penn. St.*, 385, 389.

[5] *Thomp. & M. on Juries*, § 386 (1), and cas. cit.
Carlin *vs.* Chicago, etc., R. R. Co., 31 *Iowa*, 370 (an erroneous instruction taken out).
Durfee *vs.* Eveland, 8 *Barb.*, 46 (counsel's minutes of testimony).
Mitchell *vs.* Carter, 14 *Hun*, 448 (judge's minutes of testimony).
O'Brien *vs.* Merchants' Fire Ins. Co., 38 *N. Y. Super. Ct.* (*J. & S.*), 482 (a prejudicial paper inadvertently left in an account book taken out. Judgment reversed).
Nolan *vs.* Vosburg, 3 *Ill. App.*, 596.

In an action to recover the balance struck on an *account rendered*, it was held error to allow the jury to take out the account itself, which was incompetent evidence and contested.

Watson *vs.* Davis, 7 *Jones* (*N. C.*) *L.*, 178.

As to *computations* to aid the jury in estimating the amount due the plaintiff, the cases are conflicting. In *Michigan* it is the practice to allow the jury to take such a computation, made by the plaintiff's attorney, to the jury-room, provided they understand that it is not evidence.

Millar *vs.* Cuddy, 43 *Mich.*, 273.

But the practice was disapproved of in Hatfield *vs.* Cheaney, 76 *Ill.*, 488, where a witness made a computation of the amount due upon a note and made a memorandum of the result upon the note itself, to go to the jury. The practice is also disapproved of in Alexander *vs.* Dunn, 5 *Ind.*, 122.

And in Burton *vs.* Wilkes, 66 *N. C.*, 604, it was held error for a judge to hand to the jury an abbreviated estimate of plaintiff's claim for damages, against the wish of the opposite party.

See also Drew *vs.* Andrews, 8 *Hun*, 23, where it was held error for the Court to direct the jury to take out the pleadings and from them fix the amount due the plaintiff after having already found for the plaintiff without fixing any amount.

Law books should not be taken out by the jury.

Harrison *vs.* Hance, 37 *Mo.*, 185.

Merrill *vs.* Nary, 10 *Allen*, 416 (a well considered case).

State *vs.* Smith, 6 *R. I.*, 33.

Newkirk *vs.* State, 27 *Ind.*, 1.

State *vs.* Kimball, 50 *Me.*, 409, 418 (where it was held no error to refuse to allow the jury to take out the Revised Statutes).

[*Contra*, Loew *vs.* State, 60 *Wisc.*, 559, s. c., 19 *Northw. Rep.*, 695.]

Even where both parties consent.

Burrows *vs.* Unwin, 3 *Car. & P.*, 310.

Nor *scientific books*, nor maps.

Thomp. & M. on Juries, § 392; citing State *vs.* Gillick, 10 *Iowa*, 98, and State *vs.* Hartman, 46 *Wisc.*, 248.

See also State *vs.* Lautz, 23 *Kans.*, 728.

But it is not error for a jury to use a dictionary to ascertain the meaning of a word employed by them in a special verdict.

Wright *vs.* Clark, 50 *Vt.*, 130; s. c., 28 *Am. R.*, 496.

And in United States *vs* Horn, 5 *Blatchf.*, 105, the use of city directories by the jury in their room was held insufficient ground for a new trial.

As the *judge's minutes* of the testimony are usually imperfect and are likely to have marginal notes, underscorings and comments written upon them, it is obvious that they should never go to the jury, and if the jury obtain them even accidentally, it is ground for a new trial.

Neil *vs.* Abel, 24 *Wend.*, 185.

Mitchell *vs.* Carter, 14 *Hun*, 448.

It is also erroneous for the *minutes of counsel* to go to the jury, and a new trial will be granted unless it affirmatively appears that the losing party could not have been prejudiced thereby.

Durfee *vs.* Eveland, 8 *Barb.*, 46.

As to *juror's minutes* of the testimony, it is provided by statute in some states (see note 1 under § 1 above), that they may be taken to the jury room; but in the absence of a statute, it has been held in Indiana that, as jurors would be too apt to rely on what might be imperfectly written and thus make the case turn on a part of the facts, it is error to allow such minutes to be taken out.

Cheek *vs.* State, 35 *Ind.*, 492, 495.

3. *Several documents.*—If there are several documents and counsel do not agree on which shall be sent out, it is proper practice on sending any one or more out, to send all that have been put in evidence relating to the same subject.

XIX. — FURTHER INSTRUCTIONS AND EVIDENCE.

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1. *Power and duty of giving further instructions.*— After the jury have retired to deliberate upon their verdict, the judge of his own motion has power to recall them, and in the presence of the parties or their counsel give them further instructions,[1] or withdraw erroneous instructions; but this is in the discretion of the Court, and not the legal right of a party.[2]

When the jury makes a reasonable request for further instructions and either party joins in such request, it may be error to refuse.[3] But after the jury have retired, the judge is not bound to comply with a party's request to give additional instructions upon a point not covered by a request of the jury;[4] nor to comply with a party's request to give the jury further instructions by way of explanation or modification of those already given;[5] for it is a matter within the discretion of the Court.

A fresh discussion by counsel of the law or the evidence, in the presence of the jury, cannot be had unless allowed by the judge in his discretion.[6]

When further instructions are given, they are subject to exceptions for error, the same as those given before the jury retired.[7]

[1] 2 *Grah. & W. on N. Tr.*, 356 (*a*).
Thomp. & M. on Juries, § 355, and cas. cit.
Commonwealth *vs.* Snelling, 15 *Pick.* (*Mass.*), 321, 333.

See Hogg *vs.* State, 7 *Ind.*, 551 (where it was held no error to give further instructions even against the wishes of counsel for both sides).

[2]Turner *vs.* Foxall, 2 *Cranch C. Ct.*, 324.
Forrest *vs.* Hanson, 1 *id.*, 63.
United States *vs.* White, 5 *id.*, 116.

See Tinkham *vs.* Thomas, 34 *N. Y. Super. Ct.* (*J. & S.*), 236, where it was held no error for the judge to refuse to receive or entertain proposed requests to charge the jury after they had just been charged, and some of them had left the jury box on their way to the jury-room, although all of them were still in the court-room.

[3]See Drew *vs.* Andrews, 8 *Hun*, 23, where the jury having retired, and having sent in to request the Court to give them information as to what a witness had testified to upon a certain point, and the counsel for the losing party having, in the presence of the opposite counsel, asked the Court to bring in the jury and state the evidence to them as requested,—the refusal of this reasonable request was one of the grounds upon which a new trial was granted.

In Cook *vs.* Green, 1 *Hals.* (*N. J.*), 109, the Court says: "If a jury, after withdrawing to consider the cause, get embarrassed on a question of law, they may, and, in prudence ought to, ask for the opinion of the justice thereon, and it is his duty to declare the law to them."
See also Yeldell *vs.* Shinholster, 15 *Geo.*, 189.

Compare Swaggerty *vs.* Caton, 1 *Heisk.*, 199, where, in a criminal case, the jury reported to the judge in open Court that they could not agree, but did not ask for further instructions, and it was held error for the judge to repeat to them certain disjointed portions of the charge already given, since it would lead the jury to suppose that such portions of the charge were the controlling features of the case.

[4]Kellogg *vs.* French, 15 *Gray*, 354.

[5]Nelson *vs.* Dodge, 116 *Mass.*, 367.

[6]Nelson *vs.* Dodge (*above*).

See Ruffing *vs.* Tilton, 12 *Ind.*, 259, where it is held no error to permit counsel to discuss to the Court what the form of the verdict shall be, in the presence of the jury, they having come in for instructions thereupon.

In Cotten *vs.* Rutledge, 33 *Ala.*, 110, it is held that, where both parties have waived their right to argue by declining so to do, allowing one party to reread a record to the jury on their coming for instructions, does not revive the right of the other to argue the case.

[7]Nelson *vs.* Dodge, 116 *Mass.*, 367.

2. *Manner of giving.*—Further instructions as to the case, after the jury have retired, should be given only in open Court, and when counsel on both sides are present or have had notice and an opportunity of being present. This is matter of legal right. If either party requests that a further instruction be given, or if the jury send in an inquiry, it is proper practice to submit the answer, in writing, to counsel, and if they consent, to send it to the jury; if counsel do not consent, then to call in the jury and answer their inquiry in open court.

Thomp. & M. on Juries, § 355.
Rogers *vs.* Moulthrop, 13 *Wend.*, 274.
Watertown Bk. *vs.* Mix, 51 *N. Y.*, 558.
Cook *vs.* Green, 1 *Hals.* (*N. J.*), 109.
Campbell *vs.* Beckett, 8 *Ohio St.*, 210.

In Cook *vs.* Green (*above*), the Court says that if counsel "sought for honestly at the *place of trial*, where they ought to be, cannot be found, or being found, they or either of them refuse to attend, such absence or refusal does not release the justice from his duty to declare the law to the jury."

See also Preston *vs.* Bowers, 13 *Ohio St.*, 1, where it is held no error for the Court to give further instructions to the jury during its regular session in open Court in the absence of a party or his counsel after the parties and their counsel have been loudly called at the door.

And in Chapman *vs.* Chicago & N. W. R. R. Co., 26 *Wisc.*, 295; s. c., 7 *Am. R.*, 81, where further instructions were given to the jury at their request *in open Court*, but in the absence of one of the parties and his counsel, to whom no notice was given, it was held not to be a private communication, and that the failure of the Court to give the customary notice was no error, and that the giving of notice to counsel in such a case is a matter of grace or favor on the part of the Court, and not of legal obligation; but that it is the legal obligation and "duty of counsel and suitors to be present in Court when their causes are moved or any proceedings taken in them; and if they are not, it is at their own risk, and not at the risk of the other party, if the Court sees fit not to notify them." But it is to be observed that the Court speak of the fact that the absent party and his counsel were well aware of the hour

in the evening to which the Court had adjourned for the express purpose of reviewing the verdict, if any, and discharging the jury; and also that the Court expressly approve of the custom of giving notice to absent counsel, and makes the significant remark that "the Court may proceed without it [notice] subject to the power of opening the proceedings where sufficient cause of absence is shown, and it appears that injustice has been done." The Court distinguished the cases of Redman *vs.* Gulnac, 5 *Cal.*, 148, and Campbell *vs.* Beckett, 8 *Ohio St.*, 210 (*above*), from the one at bar, on the ground that the former was a decision under a statute of California positively prohibiting further instructions in the absence of counsel, and that the latter was a case where, unlike the one at bar, the further instructions were given *during a recess* of the Court, and in the absence of both parties and their counsel.

In Campbell *vs.* Beckett (*above*) the Court quotes, with apparent approval, the passage given above from Cook *vs.* Green, but adds that in the case under consideration the instructions were given without notice to the absent counsel, and "during the hours of recess of the Court when it was neither the duty nor custom of parties or their counsel to be in the court-room." It may be added that this Ohio case was decided under a provision of the Code in that state requiring further instructions to the jury to be given in open Court "in the presence of, or after notice to the parties or their counsel;" and the Court was of the opinion that the provision was intended to express, and did in fact correctly express the common law rule upon the subject.

In Taylor *vs.* Manley, 14 *Miss.* (6 *S. & M.*), 305, judgment was reversed for error in giving instructions to the jury in absence of the parties and without their consent during a recess of the Court, even though the jury had returned and asked for an explanation of a matter of law, for it contravened a Mississippi statute requiring instructions to be given at the request of a party.

As an *exception* to the rule that further instructions must be given in open Court in the presence of counsel, it seems that the judge may go alone to the jurors' room to give them further instructions at their request (Taylor *vs.* Betsford, 13 *Johns.*, 487; Moody *vs.* Pomeroy, 4 *Denio*, 115); or may send them written instructions at their request (Plunkett *vs.* Appleton, 9 *N. Y. Super. Ct.* (*J. & S.*), 159; provided that in each case the parties give their *express* consent, which it seems must be affirmatively proved and cannot be inferred from counsel's fail-

ure to object when knowing that the judge is going to do either one of those things (same cases). In Whitney *vs.* Crim, 1 *Hill*, 61, the complaining party had told the judge that the jury wished to see him, and it was held to be equivalent to an express consent that the justice should go into the jury-room.

So, too, it seems no ground for a new trial that the jury are given further instructions in their own room provided the parties or their counsel are present, or have notice and an opportunity of being present.

Rogers *vs.* Moulthrop, 13 *Wend.*, 274.

Cook *vs.* Green, 1 *Hals.* (*N. J.*), 109.

The cases in New Hampshire also form an exception to the rule, and it is settled in that state that upon the request of the jury after they have retired, and after the Court has adjourned, the judge may send them further instructions in writing as to a *matter of law*, even though counsel are not present; (School District *vs.* Bragdon, 3 *Fost.* [*N. H.*], 507, 517, which states that the broad rule of Sargent *vs.* Roberts, 1 *Pick.* [*Mass.*], 342, is not recognized in New Hampshire); but cannot send them further instructions as to a *matter of fact* (Sharpley *vs.* White, 6 *N. H.*, 172, 176); since any error in stating the evidence to the jury could not be corrected, as a matter of law may, upon exceptions to the written instructions, which should be returned by the jury with the other papers in the case when they come into Court.

So, too, in South Carolina, what communication may be made by the Court to the jury after they have retired is left entirely to the discretion of the judge (Goldsmith *vs.* Solomons, 2 *Strobh. L.*, 296, 300, which disapproves of Sargent *vs.* Roberts, 1 *Pick. Mass.*, 342).

In Virginia, also, it would seem to be left to the discretion of the judge as to what communications he shall make to the jury during their deliberations (see Phillips *vs.* Commonwealth, 19 *Gratt.*, 485, 533, where it was held not a ground for a new trial that the judge visited the jury in their room and inquired after their health and took personal custody of a juror separated from his fellows for a short time; and the Court was also of the opinion that it is "in the competency of a judge out of Court, as necessity or occasion may require, to direct, superintend and charge jurymen and other officers of the Court in matters pertaining to their official conduct and behavior out of court").

In the United States Circuit Court, sitting in Rhode Island, the practice is that if the jury send a written request

for instructions from the Court when not in session, the Court, after summoning the counsel and making known to them the inquiry of the jury, will then answer it in writing if the Court think it safe and proper to do so.
Norris *vs.* Cook, 1 *Curt. C. Ct.*, 464.

3. *Further evidence.*—The judge has power in his discretion to recall a witness that he may repeat testimony as to which the jury are in doubt,[1] or to allow new evidence to be taken on a question of fact on which they are in doubt.[2]

[1] Blackley *vs.* Sheldon, 7 *Johns.*, 32.
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.* 437, 441; s. c., 11 *Am. R.*, 724 (*Per* Folger, *J.*).
Virginia *vs.* Zimmerman 1 *Cranch. C. Ct.*, 47.

[2] Commonwealth *vs.* Ricketson, 5 *Met.* (*Mass.*), 412 (*dictum*, sanctioning course of judge in allowing a witness to be called to testify on a point as to which the jury inquired).
Henlow *vs.* Leonard, 7 *Johns.*, 200.

4. *Inducing agreement.*—The judge must not coerce the jury into agreeing upon a verdict by intimidation or threats to subject them to any unreasonable inconvenience,[1] yet he may, and ought to urge upon the jury, all proper motives to induce them to agree upon a verdict, such as the propriety of a spirit of liberal concession in their deliberations, and the importance to the parties and the public of a verdict, and the saving of time and expense of a new trial.[2]

[1] Spearman *vs.* Wilson, 44 *Geo.*, 473.
Pierce *vs.* Pierce, 38 *Mich.*, 412.
Green *vs.* Telfair, 11 *How. Pr.*, 260.
Slater *vs.* Mead, 53 *id.*, 57.
Compare Erwin *vs.* Hamilton, 50 *id.*, 32.

[2] Green *vs.* Telfair, 11 *How. Pr.*, 260.
Allen *vs.* Woodson, 50 *Geo.*, 53.
s. p., Pierce *vs.* Rehfuss, 35 *Mich.*, 53.
But instructing them that they must compromise on amount, *held* error.
Edens *vs.* Hannibal & St. J. R. R. Co., 72 *Mo.*, 212.

In order that a verdict may result from a further deliberation of the jury after proper admonitions as to their duty to try to agree, it is well settled that it is entirely within the sound discretion of the judge as to how long to keep them together, and it is no error or irregularity for him to refuse to discharge them until he is satisfied that there is no reasonable prospect of an agreement.

White *vs.* Calder, 35 *N. Y.*, 183; s. c., 33 *How. Pr.*, 392.

Erwin *vs.* Hamilton, 50 *How. Pr.*, 32.

Coit *vs.* Waples, 1 *Minn.*, 134.

See People *vs.* Green, 13 *Wend.*, 55, where the jury were discharged after they had deliberated only thirty minutes, and, although a criminal case, the rule seems to apply with even greater force in civil cases.

When satisfied there is no reasonable prospect of an agreement, it is his duty to discharge them.

People *vs.* Green, 13 *Wend.*, 55, 58.

Green *vs.* Telfair, 11 *How. Pr.*, 260, 262.

But the judge cannot make an agreement of the jury a condition of their discharge.

Slater *vs.* Mead, 53 *How. Pr.*, 57.

And it seems he should not intimate to them how long he intends to keep them together.

Green *vs.* Telfair, 11 *How. Pr.*, 260, 262.

Regina *vs.* Charlesworth, 1 *B. & S.*, 523, where Crompton, J., says: "It is a dangerous thing to say that the jury should be discharged in a certain time, or in a few hours. I think that they should be kept, not to coerce them, but for such a time as that they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.'"

Compare Erwin *vs.* Hamilton, 50 *How. Pr.*, 32, 35.

In some States the matter is regulated by statute; as in New York, where, following the common law rule, the Code of Civil Procedure, § 1181, provides that the jury may be discharged, in case of disagreement, after being kept together for such a time as is deemed reasonable by the Court.

N. Y. Code Civ. Pro., §§ 1181, 3347.

XX.—RECEIVING VERDICT.

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1. *Presence of parties.*—The judge ought not, without necessity, to receive a verdict unless the parties are present or represented, or have had fair notice and opportunity to be present if within reasonable call. But in the absence of an adjournment to a fixed hour it is their duty to be within call.

Counsel cannot rely on having a new trial because of the inadequacy or omission of notice to them that the jury have come in.

At common law a verdict could not be received by the Court in the absence, or even without the consent of the plaintiff or his counsel, for his non-consent was a voluntary nonsuit.

People *vs.* Mayor's Court of Albany, 1 *Wend.*, 36.
See also Division XIV. of this Brief, on "*Stopping the case.*"

Under the new procedure, a cause cannot be thus stopped at this point. Counsel for each party must hold himself in readiness to attend without notice, if there is no fixed adjournment or understanding that notice is to be given.

The mere fact that a verdict was received in the absence of *defendant* and his counsel when neither had opportunity to be present, or,—in jurisdictions where, after giving the case to the jury, there is no voluntary nonsuit,—it was received in the absence of *plaintiff* and his counsel when neither had opportunity to be present,—

is not alone error, without some other informality, or some resulting prejudice to the party.

Perry *vs.* Mulligan, 58 *Geo.*, 479 (defendant absent).

Stiles *vs.* Ford, 2 *Col. T.*, 128 (plaintiff absent: a well considered case).

Merwin *vs.* Wheeler, 41 *Conn.*, 14, 26 (plaintiff absent).

It is not necessarily a matter of right for the prisoner to have his counsel present on the reception of the verdict.

Sutliffe *vs.* State, 18 *Ohio*, 469.

"It was their business to be in Court when the judge was in Court. * * * Counsel must see to it that they are near when the judge moves, and be ready to move with him."

Perry *vs.* Mulligan, 58 *Geo.*, 479.

2. *Place.*—The Court may, when necessary on account of illness of a juror, adjourn to where he is to receive the verdict.

In King *vs.* Faber, 51 *Penn. St.*, 387, where a juror was taken ill after the verdict was sealed, it was held no error for the Court to adjourn to his house and there have the verdict rendered in the presence of Court officers and all parties in the same manner as if in Court, the verdict being afterwards publicly announced by the clerk in the Court-room.

3. *Time,—Sunday.*—Court may be opened on Sunday to receive a verdict in a cause submitted to the jury on a previous day; and then may be adjourned over.

Reid *vs.* The State, 53 *Ala.*, 402; s. c., 25 *Am. R.*, 627, and cas. cit.

The statutory prohibition against opening Court or transacting business therein on Sunday, except receiving a verdict or discharging a jury (2 *N. Y. R. S.*, 275, § 7, same stat. revised in *Code Civ. Pro.*, § 6), impliedly allows the Court on committing a cause to the jury on a Saturday to adjourn till Sunday.

Such prohibition does not preclude the giving of further instructions on Sunday when a jury on that day report their disagreement.

Jones *vs.* Johnson, 61 *Ind.*, 257.

Or if it does, the prohibition may be to that extent waived by neither party objecting.
Roberts *vs.* Bower, 5 *Hun*, 558.

4. *Definiteness.*—If a verdict, special verdict, or finding, is not definite or certain, either party may require it to be made so before the jury are discharged.

Kansas Pacific R. R. Co. *vs.* Pointer, 14 *Kans.*, 37.
S. P., Bruck *vs.* Mansbury, 102 *Penn. St.*, 35.

5. *Sealed verdict.*—The jury must all be present in open Court,[1] at the opening of a sealed verdict.[2] But this may be expressly waived.[3]

[1] The consent of parties held not sufficient to sanction the clerk in presiding in the absence of the judge.
Willet *vs.* Porter, 42 *Ind.*, 250.

Act of judge in receiving verdict in absence of parties and clerk, *held* to make it a privy verdict, and of no effect, although read in Court next morning.
Young *vs.* Seymour, 4 *Nebr.*, 86.

[2] Norvell *vs.* Deval, 50 *Mo.*, 272; S. C., 11 *Am. R.*, 413 (juror taken insane after verdict sealed, and before opening).
Crotty *vs.* Wyatt, 3 *Ill. App.*, 388 (party deprived of right to poll).
King *vs.* Faber, 51 *Penn. St.*, 387 (Court adjourned to house of sick juror in order to secure presence; held no error).
Sargent *vs.* State of Ohio, 11 *Ohio*, 472, (*dictum* in criminal case).
Tifield *vs.* Adams, 3 *Iowa*, 487 (presence presumed if record does not show the contrary).
Bass *vs.* Hanson, 9 *id.*, 563 (accidental unsealing in the hands of foreman disregarded).

Omission to ask jurors whether they agreed to the verdict, *held* no error where objection was not made at the time.
Paige *vs.* O'Neal, 12 *Cal.*, 483.

[3] Woods *vs.* Commissioners of Van Buren Co., 1 *Morr.* (*Iowa*), 441.

Presence of the jury was held expressly waived where the parties had stipulated that the jury might deliver it "to the officer in charge, and *disperse:*" this being a waiver of the right to poll.
Koon *vs.* Phœnix Mut. Life Ins. Co., 104 *U. S.* (14 *Otto*), 106.

So also of an agreement that they "*need not return.*"
Pierce *vs.* Hasbrouck, 49 *Ill.*, 23.
s. p., Burlingame *vs.* Burlingame, 18 *Wisc.*, 285.

Otherwise of a mere agreement that they might render a sealed verdict.
Steele *vs.* Etheridge, 15 *Minn.*, 503.
Root *vs.* Sherwood, 6 *Johns.*, 68.
Fox *vs.* Smith, 3 *Cow.*, 23.

An order to seal and *deliver to the Clerk*, made under agreement of parties, *held* to dispense with return of the jury, and to preclude their amending the verdict afterward.
Trout *vs.* West, 29 *Ind.*, 51.

6. *Polling the jury.*—Either party has an absolute right to have the jury polled on the rendering of their verdict, whether sealed or oral, at any time before it is recorded, unless the right has been expressly waived.[1]

This rule does not apply to a verdict fixed by the direction of the Court.[2]

[1] Labor *vs.* Koplin, 4 *N. Y.*, 547.
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724, and cases cited (sealed verdict).
James *vs.* State, 55 *Miss.*, 57 (sealed verdict).
Steele *vs.* Etheridge, 15 *Minn.*, 503 (*dictum* that the right to poll the jury is not affected by an agreement that the jury may seal their verdict, but see note on p. of this Brief for rule in case of agreement that they may seal *and disperse*).
Martin *vs.* Morelock, 32 *Ill.*, 485, 487.
Crotty *vs.* Wyatt, 3 *Ill. App.*, 388.

[*Contra.* In *Massachusetts* and *Connecticut*, however, it is not a matter of right to have the jury polled, the opportunity afforded for open dissent on the part of a juror being deemed sufficient.]
Commonwealth *vs.* Costley, 118 *Mass.*, 1.
State *vs.* Hoyt, 47 *Conn.*, 533, 534.

In *Texas* and *Florida*, in the case of a sealed verdict brought in by consent, it is held that it is not a matter of right to have the jury polled, except in Texas, to ascertain whether they agreed when the verdict was sealed.
Hancock *vs.* Winans, 20 *Texas*, 320.
Whitner *vs.* Hamlin, 12 *Fla.*, 18 (holding it discretionary)].

After the verdict has been received and recorded it is too late to make a request to poll the jury.

High *vs.* Johnson, 28 *Wisc.*, 72 (no error to refuse such request).

But the mere entry of the verdict in the clerk's rough minutes does not necessarily constitute a recording within the rule, until after the jury are discharged.

Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724 (where the jury, not yet discharged, were held properly polled after the entry of a sealed verdict in the clerk's minutes).

Compare Steele *vs.* Etheridge, 15 *Minn.*, 503 (where it was held that a polling after recording was of no effect, even though it took place before the jury were discharged, and one of the jurors dissented. *Held* also that affidavits would not be received to prove that the polling really took place before the recording, when the record stated that the polling was after the verdict was recorded).

[2]McLaren *vs.* Indianapolis & Vinc. R. R. Co., 83 *Ind.*, 319 (where, upon directing a verdict, it was held no error to refuse to allow the jury to be polled although the statute provided that "either party may poll the jury").

7. — *the question.*—The question put to each juror, on polling, must simply be, "Is this your verdict?"

The reason is that the object in polling is simply to ascertain if the verdict announced is that of the jurors.

Labor *vs.* Koplin, 4 *N. Y.*, 547 (error to allow the question, "Is this your verdict against each of defendants?").

Leighton *vs.* People, 10 *Abb. N. C.*, 261 (affi'd in 88 *N. Y.*, 117, but not discussing the point), where stating the proper question to be asked, it was held no error to decline to inform the jury that the answer given should be the conscientious individual opinion of each man.

Bowen *vs.* Bowen, 74 *Ind.*, 470 (where the question, "Is this your verdict, and are you still satisfied with it?" was held properly excluded).

8. — *the right and consequence of dissent.*—A juror has a right to dissent from the verdict, whether sealed or oral, at any time before it is recorded and before they have been discharged.

Upon such dissent they should be sent back for further deliberation.

Bunn *vs.* Hoyt, 3 *Johns.*, 255.
Douglass *vs.* Tousey, 2 *Wend.*, 352.
Weeks *vs.* Hart, 24 *Hun*, 181.
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724 (sealed verdict).

But a juror who dissents from a sealed verdict he signed, may be punished for contempt in signing what was not his verdict, if the act be not excused. Van Vorst, *J.*, in an unreported case.

An evasive answer, such as "I consented to it," must be objected to at the time if at all.
Green *vs.* Bliss, 12 *How. Pr.*, 428.

Dissent and change induced from being told that the legal effect of their special findings would be contrary to the general verdict, *held* not to avail.
Fitzpatrick *vs.* Himmelman, 48 *Cal.*, 588.

9. *Power of the jury to correct their verdict.*—At any time before the verdict has been recorded and their relation to the case as jurors has ceased, the jury may alter their verdict either in form or substance, whether it be oral or sealed.

Bishop *vs.* Mugler, 33 *Kans.*; abstr. s. c., 24 *Am. L. Reg., N. S.*, 280.
Herzberg *vs.* Murray, 40 *Super. Ct.* (*J. & S.*), 271.
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724 (sealed verdict).
Beal *vs.* Cunningham, 42 *Me.*, 362 (insertion of "not" before "guilty" allowed).
Hamilton *vs.* Barton, 20 *Iowa*, 505.
Comer *vs.* Jackson, 50 *Ala.*, 384.
Watertown Ecc. Soc. Appeal, 46 *Conn.*, 230.
Art. in 20 *Cent. L. J.*, 145, and cas. cit.

Filing a sealed verdict, not recording within this rule.
Rees *vs.* Stille, 38 *Penn. St.*, 138.

10. *Power of the Court to require jury to correct.*—Before a verdict, whether oral or sealed, is recorded, and the jury have been dismissed from their relation as

such to the case, the Court has power to require them to reconsider their verdict, not merely to correct a mistake in form or make that plain which was obscure, but to supply what is wanting, or alter it in substance, if they so agree.[1]

This rule applies whether they have announced agreement,[2] or dissent appears.[3]

[1] Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.
Tyrrel *vs.* Lockhart, 3 *Blackf.*, 136.
Reitenbach *vs.* Luderick, 31 *Penn. St.*, 131 (sealed verdict).
Bolster *vs.* Cummings, 6 *Me.*, 85.
Sutliff *vs.* Gilbert, 8 *Ohio*, 405 (computation which verdict directed to be made).
Mason *vs.* Massa, 122 *Mass.*, 477 (arithmetical addition).
Brown *vs.* Dean, 123 *id.*, 254 (verdict nominal damages and that defendant lower his mill dam. Correction, substantial damages alone).
Maclin *vs.* Bloom, 54 *Miss.*, 365 (omission to state amount, supplied).
Rush *vs.* Pedigo, 63 *Ind.*, 479, 483 (omission to answer special questions, supplied).
Art. in 20 *Cent. L. J.*, 145, and cas. cit.

[2] Florence Sewing Machine Co. *vs.* Grover & Baker S. M. Co., 110 *Mass.*, 96.

[3] Root *vs.* Sherwood, 6 *Johns.*, 68.
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.

11. *Power of the Court to correct the verdict.*—The Court has power to correct an informality in the verdict, or to correct the entry thereof so as to make it conform to the real finding of the jury.[1] If a verdict disregards instructions properly given, the Court may, (if the case affords the means of so doing without a further finding upon a question which ought to be determined only by the jury,) correct the verdict in substance to conform to

such instructions;[2] otherwise the Court cannot alter a verdict in substance.

[1]Dalrymple *vs.* Williams, 63 *N. Y.*, 361; s. c., 20 *Am. R.*, 544 (finding against both when intended only against one; overruling in effect, *dictum* in Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437; s. c., 11 *Am. R.*, 724.)

Chittenden *vs.* Evans, 48 *Ill.*, 52.

Woodruff *vs.* Webb, 32 *Ark.*, 612.

Lincoln *vs.* Iron Co., 103 *U. S.* (13 *Otto*), 412.

Matheson *vs.* Grant, 2 *How.* (*U. S.*), 263, 280 (correcting general verdict, so as to apply to single count).

O'Brien *vs.* Palmer, 49 *Ill.*, 72 (rejecting surplusage).

High *vs.* Johnson, 28 *Wisc.*, 72 (inserting nominal damages where no damages were found).

Chamberlain *vs.* Brady, 49 *Super. Ct.* (*J. & S.*), 484 (correcting error in adding).

West *vs.* Bank of Americus, 63 *Geo.*, 230 (referring to pleadings to determine a great ambiguity in respect to amount, viz., meaning of "eighteen 1800 dollars").

If the verdict is inadequate in form the Court have power to interrogate the jury upon it and send them out for further deliberation necessary to put it in proper form.

Dorr *vs.* Fenno, 12 *Pick.*, 521, 526.

[2]Schweitzer *vs.* Connor, 57 *Wisc.* 177.

12. *Special questions.*—Where the jury finds a general verdict, the Court may instruct it to find also specially upon one or more questions of fact stated in writing.

N. Y. Code Civ. Pro., § 1187, third clause.

It is within the discretion of the trial judge, to the exercise of which no exception lies, to put inquiries to the jury as to grounds upon which they found their verdict; their answers may be made part of the record, and will have the effect of special findings of the facts stated by them.

Spurr *vs.* Shelburne 131 *Mass.*, 429.

13. *Insisting on answers to special questions.*—Where the statute makes the putting of special questions

a matter of right, it is error for the Court, against the objection of a party at whose request proper special questions have been put, to receive a general verdict without requiring answers to such questions.

Maxwell *vs.* Boyne, 36 *Ind.*, 120.

S. P., Crane *vs.* Reeder, 25 *Mich.*, 303 (holding it error to instruct the jury that they need not answer such questions if in doubt; because, upon every material question one party or the other holds the affirmative, and if he fails to make out his case upon it by the evidence the finding should be against him upon it. COOLEY, J.).

Whether it is error to do so where the putting of such questions is discretionary is disputed.

Affirmative—

Doom *vs.* Walker, 15 *Nebr.*, 339; s. c., 18 *Northw. Rep.*, 138.

Negative—

Moss *vs.* Priest, 19 *Abb. Pr., N. S.*, 314, 317.

14. — *on definite answer.*—A statement of the opinion or impression of the jury is not enough as an answer to a special question. The finding should be positive.

Hopkins *vs.* Stanley, 43 *Ind.*, 553, 559, and cas. cit.

15. —*failure to agree.*—If the questions have not been withdrawn and the jury cannot agree on one which involves a fact essential to sustain their general verdict, the general verdict cannot avail.[1]

But the verdict is not vitiated by inability to agree on which of two alternatives they rely on, if each would alone support the verdict.[2]

[1] Ebersole *vs.* Northern Central R. R. Co., 23 *Hun*, 114, 118.

[2] Murray *vs.* N. Y. Life Ins. Co., 96 *N. Y.*, 614.

See further, p. 189 of this Brief, paragraphs 4–6 of Division XXI.

16. *Insisting on general verdict when special questions are answered.*—Where special questions are answered the party has a right to have a general verdict rendered, unless a proper special verdict is made.

Hodges *vs.* Easton, 106 *U. S.* (16 *Otto*), 408, 412.
S. P., Carey *vs.* Dwyre, 15 *Hun*, 153.

17. — *argument; exception.*—It is in the discretion of the judge whether to hear, in presence of the jury, argument of counsel on the question of correcting a verdict.[1]

An exception lies to error in directing a correction.[2]

[1] Ruffing *vs.* Tilton, 12 *Ind.*, 259.

[2] Chittenden *vs.* Evans, 48 *Ill.*, 52.

XXI.—APPLICATIONS AFTER VERDICT.

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1. *Discharge terminates power; correction.*—After the jury have been discharged and have separated, they cannot be recalled to act as a jury in respect to the verdict.[1]

But the Court have power, within a reasonable time, to amend a mistake in the verdict; and the judge's notes[2] or the jurors' testimony may be used to show what the

verdict really was for the purpose of correcting the minutes.[3]

[1]St. Clair *vs.* Caldwell, 72 *Ala.*, 527.
Trout *vs.* West, 29 *Ind.*, 51.
People *vs.* Reagle, 60 *Barb.*, 527, 546 (so held in a criminal case even where discharge was illegal.)

Otherwise, where the Court had directed them to be discharged, and before the direction was recorded or they had separated they found they could agree.
Koontz *vs.* Hammond, 62 *Penn. St.*, 177.

[2]Matheson *vs.* Grant, 2 *How.* (*U. S.*), 263, 281.

[3]Dalrymple *vs.* Williams, 63 *N. Y.*, 361.
Dayton *vs.* Church, 7 *Abb. N. C.*, 367.
S. P., Jones *vs.* Smith, 64 *Geo.*, 711.
Burlingame *vs.* Central R. R. Co., of Minn., 23 *Fed. Rep.*, 706 (where a jury was recalled two days after their verdicts were rendered and the verdict was corrected on their affidavits that interest was intended to be added).

[*Contra*, Walters *vs.* Junkins, 16 *S. & R.*, 414; s. c., 16 *Am. Dec.*, 585.
Reitenbaugh *vs.* Ludwick, 31 *Penn. St.*, 131 (*dictum*).]

2. *Omission to record.*—An omission to properly record the verdict is an irregularity only.

Gunn *vs.* Plant, 94 *U. S.* (4 *Otto*), 304.
State *vs.* Levy, 24 *Minn.*, 362 (where entry of verdict after discharge of jury was held not to impair the verdict where before their discharge it was read to them and they were asked if it was their verdict and they assented to it,—even though a statute substantially required the clerk to immediately record the verdict and then read it to the jury before their discharge).

As to what properly constitutes a recording, see
Warner *vs.* N. Y. Central R. R. Co., 52 *N. Y.*, 437, 443; s. c., 11 *Am. R.*, 724 (per FOLGER, J.).

3. *Judgment for more than demanded in complaint.*—Where the amount of a verdict exceeds the sum demanded in the complaint, the Court has no power to

amend the complaint by increasing the demand to correspond with the amount of the verdict, unless plaintiff consents to a new trial and pays defendant's costs.[1] But the plaintiff may take judgment for the amount demanded in his complaint, remitting the excess.[2]

The objection that the amount of recovery exceeds demand, is waived unless taken before the entry of judgment.[3]

And an allegation of damages, as distinguished from a demand in the demand for relief, may, it seems, be amended after a verdict exceeding the amount of the allegation, but not exceeding the demand.[4]

[1] Coming *vs.* Coming, 6 *N. Y.*, 97.
Decker *vs.* Parsons, 11 *Hun*, 295.
Pharis *vs.* Gere, 31 *id.*, 443.
Compare Knapp *vs.* Roche, 62 *N. Y.*, 614 (sanctioning amending at trial to conform complaint to proof).

[2] Coming *vs.* Coming (*above*).

[3] Brown *vs.* Schoonmaker, 10 *Reporter*, 745.

[4] Schultz *vs.* Third Ave. R. R. Co., 89 *N. Y.*, 242, 247 (per Earl, J.).
Where a complaint has been improperly amended after verdict by increasing the demand, it seems that the irregularity in the verdict should be taken advantage of by motion and not by an exception.
Diossy *vs.* Morgan, 74 *N. Y.*, 11, 14.

4. *Effect of special findings.*—Answers to special questions submitted to the jury, if inconsistent with the general verdict, control the latter and the Court may give judgment accordingly,[1] and this is to be entered without setting aside the general verdict.[2]

A finding is not inconsistent with the general verdict within this rule, if any other hypothesis of fact capable of being supported by the evidence before the jury, might supply its place.[3]

[1] Fraschieris *vs.* Henriques, 6 *Abb. Pr., N. S.*, 251, 263 (per Brady, J.).
Dempsey *vs.* Mayor, etc., N. Y., 10 *Daly* (*N. Y.*), 417, 418 (citing *Code Civ. Pro.*, § 1188).

Nichols *vs.* Weaver, 7 *Kans.*, 373 (citing *Kans. Gen. Stat.*, 684, § 287).
Tobie *vs.* Brown Co., 20 *Kans.*, 14.
Leese *vs.* Clark, 20 *Cal.*, 387 (judgment reversed for error in refusing to enter judgment on special findings).
McDermott *vs.* Higby, 23 *Cal.*, 489.
Baird *vs.* Chicago, R. I., etc., R. R. Co., 55 *Iowa*, 121; s. c., 7 *Northw. Rep.*, 460.
Ogg *vs.* Sheehan, 22 *Northw. Rep.*, 557.
Everett *vs.* Buchanan, 2 *Dak.*, 249 (citing *Dak. Code Civ. Pro.*, § 261, but holding that the special findings were not inconsistent with the general verdict).
Bremmerman *vs.* Jennings, 61 *Ind.*, 334 (where upon a general verdict for a defendant, who had set up fraud and failure of consideration in an action on a promisory note, *held*, error to refuse to enter judgment for plaintiff upon the special findings that he bought the note for value before maturity and without notice).
Nelson *vs.* Neely, 63 *Ind.*, 194.
Hogan *vs.* Chicago, M., etc., R. R., Co., 59 *Wisc.*, 139.

[2] Dempsey *vs.* Mayor, etc., of N. Y., 10 *Daly*, 417.

[3] Kellow *vs.* Central Iowa R. R. Co. (*Iowa*, 1885), 23 *Northw. Rep.*, 745.

5. — *indirect finding.*—A special finding, as to any fact necessary to be proved, to the effect that there is not sufficient evidence of it, is equivalent to a finding against it, and entitles the adverse party to judgment.

M'Limans *vs.* City of Lancaster (*Wisc.*, 1885), 23 *Northw. Rep.*, 694.

6. —*failure or refusal to find.*—If the jury fail to agree on an answer to a special question, this is equivalent to a finding inconsistent with the general verdict, provided the fact is indispensable to support such a verdict. Otherwise, if the verdict can be supported on any other hypothesis within the scope of the evidence before the jury.

S. P., Kellow *vs.* Central Iowa R. R. Co. (*Iowa*, 1885), 23 *Northw. Rep.*, 745.

7. *Ordering exceptions to the General Term.*—A party who has taken an exception may move before the trial judge at any time during the same term, that the exceptions be heard on the first instance at General Term, and judgment be suspended in the meantime. It is in the discretion of the judge to grant or deny the motion.

N. Y. Code Civ. Pro., § 1000.

If granted the proceeding at General Term is treated as a motion for a new trial, and may be brought on by either party. *Ib.*

This motion may be granted even though a motion on the minutes for a new trial is denied

Garner *vs.* Mangam, 46 *Super. Ct.* (*J. & S.*), 365.

[*Contra*, Byrnes *vs.* D. & H. C. Co., 7 *Weekly Dig.*, 549.]

This motion, however, cannot be availed of in a County Court, because it has no General Term, and the General Term of the Supreme Court has no jurisdiction of such a motion made in a County Court.

Johnson *vs.* N. Y., Ontario, etc., R. R. Co., 30 *Hun*, 166.

This may be done in case of a nonsuit.

Code Civ. Pro., § 1000, as am'd in 1882, superseding Seely *vs.* N. Y. Central R. R. Co., 25 *Hun*, 280.

So under the corresponding section of the *Code of Procedure*, § 265, exceptions could be had at General Term in case of a nonsuit.

Lake *vs.* Artisans' Bank, 3 *Abb. Ct. App. Dec.*, 10; s. c., 3 *Abb. Pr., N. S.*, 209; 3 *Keyes*, 276, rev'g 17 *Abb. Pr.*, 232.

Molony *vs.* Dows, 9 *Abb. Pr.*, 86; s. c., 18 *How. Pr.*, 27.

Brown *vs.* Conger, 8 *Hun*, 625.

And plaintiff's exception to a nonsuit could be ordered to be heard at General Term

Mason *vs.* Breslin, 9 *Abb. Pr., N. S.*, 427; s. c., 40 *How. Pr.*, 436; 2 *Sweeney*, 386.

In Johnson *vs.* N. Y., Ontario, etc., R. R. Co., 30 *Hun*, 166, a case arising under *Code Civ. Pro.*, § 1000, it seems to be assumed that exceptions could be heard at General Term in case of a nonsuit, but the point was not raised or discussed, because the Court held that the General Term of the Supreme Court had no jurisdiction of exceptions taken in a County Court.

The order sending exceptions to the General Term does not of itself, it seems, suspend the entry of judgment, and should therefore expressly provide for the suspension of judgment upon the verdict.

Douglas *vs.* Haberstro, 10 *Abb. N. C.*, 6; s. c., 62 *How. Pr.*, 29.

Only the exceptions are sent to the General Term. The evidence cannot be reviewed in order to set aside the verdict as excessive or against evidence.

Post *vs.* Hathorn, 54 *N. Y.*, 147, 151.
Metropolitan Nat. Bank *vs.* Sirret, 97 *N. Y.*, 320.
Ross *vs.* Harden, 42 *Super. Ct.* (*J. & S.*), 427.
Quinn *vs.* Carr, 6 *Supm. Ct.* (*T. & C.*), 402; mem. s. c., 4 *Hun*, 259.
Hoxie *vs.* Greene, 37 *How. Pr.*, 97.
Amy *vs.* Stein, 48 *Super. Ct.* (*J. & S.*), 512.

But where there has been an exception taken to a refusal to direct a verdict in favor of a party against whom a verdict has been directed, the General Term may consider whether there was such an absence of evidence to support a material finding that the Court can determine as matter of law that the fact found was not proved.

Metropolitan Nat. Bank *vs.* Sirret, 97 *N. Y.*, 320, 325 (per ANDREWS, J.).

8. *Motion for nonsuit.*—A motion for a nonsuit cannot be made after verdict; but only renewed when it was previously made, and leave to renew was reserved.

Downing *vs.* Mann, 3 *E. D. Smith*, 36; s. c., 9 *How. Pr.*, 204.
Hendrick *vs.* Stewart, 1 *Overt.* (*Tenn.*), 476.
And see Onondaga County Mut. Ins. Co. *vs.* Minard, 2 *N. Y.*, 98.

9. *Motion to set aside verdict taken subject, etc.*—Where a verdict is directed subject to the opinion of the Court, the trial judge may at the same term set it aside and direct judgment for either party.

N. Y. Code Civ. Pro., § 1185.

In such case the other party can except, § 994, and have the judgment reviewed thereon by appeal.

10. *Further questions.*—After verdict in a cause tried by jury, it is irregular to proceed to determine further questions involved in the issues by the findings of the judge[1] or by a reference.[2]

[1]Parker *vs.* Laney, 58 *N. Y.*, 469; rev'g 1 *Supm. Ct.* (*T. & C.*), 590.

[2]Paragraph 28 on p. 132 of this Brief.

11. *Dismissing for want of jurisdiction.*—Under the act of Congress of March 3, 1875,[1] a Circuit Court of the United States may even after verdict entertain a motion to dismiss for want of jurisdiction.[2]

[1]*Supplement U. S. R. S.*, p. 175, § 5.

[2]Harlog *vs.* Memory, 23 *Fed. Rep.*, 835.

12. *Certificate for costs.*—Where the title to real property comes in question or any fact appears whereby either party becomes entitled to costs or to increased costs as prescribed by law, the judge may, upon the application of the party to be benefited thereby, either before or after the verdict is rendered, make a certificate stating the fact.

Such a certificate is a proper mode of ascertaining the fact, though there be no statute authorizing it.
Farrington *vs.* Rennie, 2 *Cai.*, 220.
Jackson *vs.* Randall, 11 *Johns.*, 405.

By the *New York* Statute, the judge is required to make it *Code Civ. Pro.*, § 3248.

It relates only to facts appearing upon the trial.
Wiley *vs.* Shaver, 1 *Supm. Ct.* (*T. & C.*), 324, 328.
Baine *vs.* City of Rochester, 85 *N. Y.*, 523 (*dicta*).

It is not needed in reference to an extrinsic fact, such as plaintiff's omission to present his claim against a municipal corporation to its chief fiscal officer before suing.
Baine *vs.* City of Rochester, 85 *N. Y.*, 523.

Where the statute expressly refers the question to the determination of the judge, a finding of the jury upon it is not necessarily conclusive upon him.
Hunt *vs.* Leon, 3 *Johns. Cas.*, 140.
So, by *Code Civ. Pro.*, § 3248, the certificate may be made *before*, or after verdict.

13. *Certificates of probable or reasonable cause.*— Circumstances which warrant suspicion[1] or reasonable doubt as to the construction of a statute[2] may be probable or reasonable cause under the United States Statutes respecting certificates.[3]

Reasonable cause and probable cause mean the same thing.[4]

[1] The Gala Plaid, 1 *Brown's Adm.*, 1 (probable cause for seizure).
s. p., The Thompson, 3 *Wall.*, 155.
Locke *vs.* The U. S., 7 *Cranch*, 339.

[2] U. S. *vs.* Riddle, 5 *Cranch*, 311, 313.

[3] *U. S. R. S.*, §§ 970, 989.

[4] U. S. *vs.* One Sorrel Horse, 22 *Vt.*, 655, 657.

14. — *application for.*—An application for a certificate of probable cause is so far distinct from the trial that the Court have power to entertain it after the trial, and may hear evidence not taken at the trial.

The Gala Plaid, 1 *Brown's Adm.*, 1 (§ 970).
s. p., U. S. *vs.* Abatoir Place, 106 *U. S.* (16 *Otto*), 160.

15. *Additional allowance.* — Applications for an additional allowance can only be made to the Court before which the trial is had, or the judgment rendered, and must in all cases be made before final costs are adjusted.

N. Y. Gen. Rule 44 (1884).

But in the N. Y. First Judicial District this rule does not authorize the application to be made out of that district, even before the same judge who tried the case.
Hun *vs.* Salter, 92 *N. Y.*, 651, citing *Code Civ. Pro.*, § 769, as controlling the rule.

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[The figures refer to pages, except those in parenthesis, which refer to paragraphs.]